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## A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations

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**U.S. House of Representatives**  
**Committee on Oversight and Government Reform**  
**Darrell Issa (CA-49), Chairman**



**A Dismissal of Safety, Choice, and Cost:  
The Obama Administration's New Auto Regulations**

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## EXECUTIVE SUMMARY

In the wake of a massive taxpayer-funded bailout and effective government control of General Motors and Chrysler, the Obama Administration took unprecedented action to extract agreement for strict new fuel economy standards from auto manufacturers. This places ideology over science and politics over process. This action has serious consequences for consumers in the choice, cost, and safety of vehicles.

While the Obama Administration has told the public and Congress it followed the statutory rulemaking process in developing these regulations, material produced by the Committee on Oversight and Government Reform documents how the Administration under an imperial presidency performed an end-run around the law and ran a White House-based political negotiation, led by “czars” who marginalized federal agencies charged in statute with setting fuel economy standards. Regulatory expertise from Department of Transportation officials, the agency charged with protecting automotive safety, were frequently mocked and belittled.

This Committee Staff Report sheds new light on the extent to which the Obama Administration strong-armed auto manufacturers at the expense of consumer choice, safety, and affordability.

For nearly four decades, the federal rulemaking process of enacting new fuel economy standards impacting domestic and foreign auto manufacturers has relied on a balanced and deliberative approach—respecting the safety requirements of consumers, the abilities of auto makers to produce products to meet these needs, and measuring the capabilities of current and next-generation technology to improve over time.

This process, known as Corporate Average Fuel Economy (CAFE) standards, is managed by the National Highway Traffic Safety Administration (NHTSA) and has produced steady improvements in fuel economy as well as significant increases in vehicle and overall roadway safety.

Under the Obama Administration, that “balanced approach” was abandoned in favor of a raw political process designed to appease environmental extremists. These special interest groups were given unprecedented and powerful seats at the table, while regulatory experts with the most expertise in this area, as well as non-partisan government policy professionals, were sidelined. White House political appointees and “czars” partnered with environmental extremists to de-emphasize NHTSA’s primary, and statutorily required, role in the process.

The result of the Obama Administration’s machinations was a drastic reconfiguration of the regulatory landscape for vehicle fuel economy and emissions never intended by Congress when it created the process in 1975.

As a result, the Environmental Protection Agency (EPA) became the lead agency and NHTSA was sidelined. At the same time, the California Air Resources Board (CARB) became a “major player” and an “aggressive participant in the process,” allowing unelected state regulators in Sacramento to set national policy outside the federal rulemaking process.

The Obama Administration also allowed environmental extremists to push a radical agreement that forced new technology requirements on the auto industry regardless of technological feasibility and a lack of consumer interest in purchasing such products. The standards require high gasoline prices – as high as \$5 or \$6 per gallon – to support consumer acceptance of advanced technology. Further, the Administration took a “divide and conquer” approach to securing automaker support and in the process provided favorable treatment to recently bailed-out domestic firms at the expense of foreign firms, even while foreign firms employ nearly as many American workers as the traditional “big three.”

This report is based on information provided by those involved in the standards process and reveals for the first time their direct, personal, and contemporaneous notes and communications. The result is a behind-the-scenes look at what many observers suspected – but heretofore could not document – to be true.

The impact of this process will not be immediate, but will be felt by manufacturers forced to make, dealers forced to sell, and consumers forced to purchase far different, more expensive, and less safe vehicles.

## FINDINGS

- The standards set by the Obama Administration will hurt American consumers by increasing the cost of automobiles and limiting vehicle choices. According to one automaker: “We believe the current proposal is not feasible. The standards appear to be based on overly optimistic assessments of the rate at which the market will accept new technologies, as well as the rate at which the new technologies will be available. We believe the regulation will force manufacturers to limit vehicle choices and will force auto companies to sell expensive technology that customers will not want or accept.”
- The standards require high gasoline prices – as high as \$5 or \$6 per gallon – to support consumer acceptance of advanced technology. As one automaker told the agencies during the rulemaking process, “[h]igher fuel economy/lower GHG performance costs money, a lot of money. Consumer acceptance/willingness to pay/gas price is an issue.”
- The standards demonstrate a complete disregard for cost and consumer choice. One automaker document explained: “Data shows high fuel economy standards kills jobs, presents doomsday scenario for automakers, and delivers insufficient pay-offs to consumers.” According to another automaker: “EPA needs to be careful about the cost required to comply with the standards to achieve the goal otherwise too expensive vehicles may be left at dealerships unpurchased.”
- The standards will have a significant negative effect on automobile safety. A survey of 1,100 automotive engineers, conducted by Wards Automotive, found that “[s]tringent fuel economy requirements like those set for 2025 will be impossible to meet without sacrificing the safety of the vehicles [we will] drive in the future.” A similar analysis by Edmunds.com showed that the proposed fuel economy standards may cause as many as 240 more automotive fatalities each year due to the overall reduced weight of vehicles.
- The process of setting the standards was highly politicized, and not based on sound science or objectivity. According to one email, “The left, along with the states, is waging a serious campaign. We cannot assume anything and shouldn’t believe EPA will base the decision on credible data – they will justify any range. It is becoming increasingly political and EPA is aligning with CA.” The Administration rushed to set the second round of fuel economy standards before the 2012 presidential election because, according to one EPA official, the President “wants to secure his legacy.”
- Although the White House told the Committee that it performed merely a “coordinating function” in negotiating the standards, documents obtained by the Committee demonstrate that it performed a far more substantive and direct role in leading the negotiations and dictating the standards.
- The Obama Administration took advantage of the uncertain regulatory circumstances and the extreme financial difficulties facing the domestic automobile industry to extract a deal that set costly and unfeasible standards for vehicle fuel economy and greenhouse gas emissions.

- The negotiations on the 2009 auto industry bailout occurred simultaneously with the negotiations on the Model Year (MY) 2012 to 2016 fuel economy standards. The vulnerability of the domestic auto industry gave the Obama Administration leverage to achieve drastic concessions by the auto industry.
- The White House forced automakers to the bargaining table by raising the possibility of a regulatory patchwork when it ordered the Environmental Protection Agency (EPA) to grant a Clean Air Act waiver for California (“California waiver”). According to one industry observer, the California waiver was a “gun to the head” of the auto industry, forcing it to engage the Administration.
- The Obama Administration sidelined the Corporate Average Fuel Economy (CAFE) program established by Congress to arbitrarily set fuel economy and greenhouse gas emissions standards. As White House adviser Carol Browner expressly told one automaker early in the process, “We need to get rid of that thing – CAFE.”
- The result of the Obama Administration’s machinations was a drastic reconfiguration of the regulatory landscape for vehicle fuel economy and emissions never intended by Congress. As a result, EPA became the “[a]rbitrator of [the] framework, in lead role now and into future framework and stringency”; the National Highway Traffic Safety Administration (NHTSA) was “[r]elegated to [a] minor supporting role”; and the California Air Resources Board (CARB) became a “major player in stringency and framework.”
- The Obama Administration, by granting the California waiver, improperly empowered California to have an oversized role in setting national standards. According to an automaker email, “the fact is that CA is getting EVERYTHING they want in this deal – they get their waiver, they get the same emission outcomes from CA vehicles, and the rest of the country gets much higher standards.”
- California thereafter became a very aggressive participant in the rulemaking process, prompting pleas for the Administration to “step up and take leadership and not allow California to lead by threats.” As one executive wrote, “it makes no sense that an environmental board in CA is usurping the regulatory prerogative, scope and expertise of NHTSA and EPA including [the] Administration’s authority and ability to weigh nationwide job and economic considerations of arbitrary politically based standards being pushed by CA.”
- The Obama Administration allowed environmental special interests to push for a “technology forcing” agreement that “promote[d] more advanced technology into the market.” The environmental lobby was so influential that one environmental advocate even reviewed the text of the mid-term review provision being negotiated and advised CARB on strategy with the auto industry.

- EPA and CARB aligned with environmental special interests to severely diminish NHTSA’s influence in the rulemaking process. The White House sided with the environmentalists, and the result was a steady de-emphasis on NHTSA’s expertise in safety, costs, and consumer preference and a corresponding overemphasis on environmental stringency.
- The Obama Administration forced stringent standards on automakers and consumers to appease environmentalists and CARB. As recounted by one auto executive: “[A]fter lengthy discussions . . . the Admin reps (and Mary Nichols of CARB) eventually fell back on the point that they need an aggressive number – and one that will ‘force’ substantial and increasing numbers of advanced technology vehicles into the market; the cost of those vehicles (to customers and/or to the automakers) was clearly not a significant concern of the regulators.”
- The Obama Administration took a “divide and conquer” approach to securing automaker support, engaging the companies individually and providing differing information to each company. “The gov’t is playing we [automakers] off of each other,” one automaker wrote. “They are telling us lies (we know cause we [automakers] talk amongst ourselves) to trick us into caving or giving us points [of] information. The entire exercise is focused on finding a way to get us to the previously announced 56mpg (5% per year for both car an[d] truck) in 2025.”
- The Obama Administration provided favorable treatment to the domestic auto manufacturers. As a NHTSA official wrote to several EPA and CARB officials: “With respect to schedule (and subject to White House agreement), we suggest that we make the initial calls to the Detroit 3 tomorrow (Thursday), provide them with the EPA and NHTSA curves . . . . [W]e need to do outreach to all of the other major manufacturers prior to determining stringencies on or before June 30.”
- When faced with the reality that the stringency “would impose . . . substantial unrecoverable costs” on the auto industry, the Obama Administration invented incentives to ease automaker compliance while maintaining the aggressive headline number. As one domestic automaker explained, “[White House official Ron] Bloom acknowledged that the stringency of the requirement is beyond [the company’s] capabilities, but they expect us to use ‘flexibilities’ that are available to fill the deficiencies.”
- The standards as set by the Obama Administration are unfair and anti-competitive in that the stringencies from 2017 to 2021 favor domestic automakers over foreign companies. One executive of a foreign automaker described the standards as a “second auto bailout.” According to another email, “[w]e will eventually reach the tipping point where the government interventions for the Detroit companies become anti-competitive – we may already be there.” Calling the proposal “not balanced and fair,” another executive from a foreign automaker stated: “I have been very challenged to explain the rational for this and some other points in the proposal to our engineers and executives inside the company.”

- The Obama Administration was aware of the inequity in the standards. White House official Ron Bloom told an executive from Toyota: “Thank you for getting this done. I know how difficult this must have been in a culture where fairness is very important.”

## INTRODUCTION

On a sunny day in May 2009, President Barack Obama announced in the White House Rose Garden an agreement on fuel economy and greenhouse gas emissions for all new cars and trucks sold in the United States.<sup>1</sup> The President, joined by members of his cabinet and several state governors, lauded the work done by his Administration, the automobile industry, environmental interest groups, and state officials in negotiating an “historic agreement” in which “everyone wins.”<sup>2</sup> Left unsaid by the President and virtually untold until now is the story of how the Obama Administration empowered the state of California to nearly destroy the domestic auto manufacturers, then leveraged their financial plight to set into law the unrealistically high fuel economy standards desired by environmental extremists. The Administration, assuming the mantle of the imperial presidency, acted in spite of clear congressional intent, using heavy-handed, Chicago-style tactics to achieve its ends. These tactics proved so useful that the White House employed them again two years later in developing a second round of regulations. Although many in the automobile industry recognized the overreach by the Administration, the industry found itself ultimately tied to the Obama White House, believing it would “gain nothing by publicly grouching or simply walking away.”<sup>3</sup>

In January 2009, when President Obama entered office, the regulatory environment for motor vehicles and the state of the automobile industry provided a distinctive set of circumstances ripe for manipulation. The Supreme Court had recently declared that EPA could regulate greenhouse gasses (GHGs) if the Administrator found that they endangered public health or welfare.<sup>4</sup> The state of California, which had suffered a setback when former EPA Administrator Stephen L. Johnson denied its waiver to regulate GHGs from automobiles in 2007, had secured a promise from the new Administration to reconsider the waiver petition.<sup>5</sup> Most crucially, the three domestic auto manufacturers were teetering on the verge of bankruptcy and two of three petitioned the new Administration for a government-financed bailout. From these unusual circumstances, the President made the automobile industry an offer they simply could not refuse. In exchange for a government-orchestrated bailout and containment of the state of California, the Obama Administration asked the industry to accept a new regulatory regime governing fuel efficiency standards. Under this regime, EPA and the state of California were to drive the policy decisions while NHTSA was relegated to a minor supporting role.

This report explains how the Obama White House dictated fuel economy and greenhouse gas standards for MY 2012 to 2016 and MY 2017 to 2025. Through coercion and enticements, the White House cobbled together an agreement of stakeholders to support this radical re-write of fuel economy policy. But beyond merely restructuring the process, the Administration openly sought a stringent standard that would “force” alternative vehicles into the American marketplace – without regard for consumer acceptance, safety consequences, or vehicle pricing. The Obama Administration’s fuel economy and greenhouse gas emissions regulations, as a

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<sup>1</sup> The White House, Remarks by the President on National Fuel Efficiency Standards (May 19, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> Email from Michael J. Robinson, Gen. Motors, to Thomas G. Stephens, Gen. Motors (Sept. 30, 2010).

[HOCCAFE13562-63]

<sup>4</sup> See *Massachusetts v. Env't'l Prot. Agency*, 549 U.S. 497 (2007).

<sup>5</sup> DOT- EPA Transition Team Mtg Notes. [MAZDA278]

result, will inevitably force Americans to purchase automobiles that they do not want, that cost significantly more, and that may be less safe to drive. These two rules also come at a substantial cost: \$51.5 billion for MY 2012 to 2016 and as much as \$140 billion for MY 2017 to 2025.<sup>6</sup> The flawed process of setting these rules will have lasting consequences for American consumers. As described by one participant in the discussions, “I have never seen such power coupled with such incompetence. It is simply embarrassing from a tax-payer perspective.”<sup>7</sup>

This report is the product of a multi-year Committee investigation. In the course of this investigation, the Committee has conducted three hearings relating to matters addressed in this report, conducted a transcribed interview of EPA Assistant Administrator Gina McCarthy, and reviewed over 15,000 documents. These documents were produced to the Committee by the Environmental Protection Agency, the National Highway Traffic Safety Administration, the California Air Resources Board, and fifteen automobile manufacturing companies. Despite multiple requests, the Executive Office of the President refused to provide any information on its involvement in developing the fuel economy and GHG emissions standards.

## BACKGROUND

### *Corporate Average Fuel Economy, the Clean Air Act, and the California Waiver*

In 1975, Congress passed the Energy Policy and Conservation Act (EPCA), which established Corporate Average Fuel Economy (CAFE) standards for passenger cars and light trucks, in response to the Arab oil embargo and subsequent oil price spikes.<sup>8</sup> The Act delegated authority to the Secretary of Transportation to set fuel economy standards.<sup>9</sup> The Secretary, in turn, delegated his authority over the CAFE program to the Administrator of NHTSA.<sup>10</sup> In setting CAFE standards, the Administrator is required to consider the “technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.”<sup>11</sup> In addition, NHTSA Administrator David Strickland told the Committee that vehicle safety, a “core mission” of NHTSA, is an important factor in setting CAFE standards.<sup>12</sup>

For almost three decades, NHTSA operated alone to regulate fuel economy of passenger cars and light trucks, until a 2007 United State Supreme Court decision permanently changed the regulatory landscape. In *Massachusetts v. EPA*, the Supreme Court was asked to decide whether

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<sup>6</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,346 (May 7, 2010); 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 76 Fed. Reg. 74,854, 74,890 (Dec. 1, 2011).

<sup>7</sup> Email from Dwight Brown, Gen. Motors, to Mary Sipes, Gen. Motors (July 15, 2011). [**HOCCAFE12101**]

<sup>8</sup> Pub. L. 94-163, 89 Stat. 871 (1975). In 2007, in passing the Energy Independence and Security Act, Congress directed NHTSA to raise CAFE standards to at least 35 miles per gallon by 2020. *See* Energy Independence and Security Act, Pub. L. 110-140 § 102, 121 Stat. 1492, 1499 (2007).

<sup>9</sup> *Id.* § 503.

<sup>10</sup> *See* Delegation Under the Energy Policy and Conservation Act, 41 Fed. Reg. 25,015 (June 22, 1976).

<sup>11</sup> 49 U.S.C. 32902(f).

<sup>12</sup> *See* “Running on Empty: How the Obama Administration’s Green Energy Gamble Will Impact Small Business and Consumers”: Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov’t Spending of the H. Comm. on Oversight & Gov’t Reform, 112th Cong. (2011) (statement of David L. Strickland, Administrator, Nat’l Highway Traffic Safety Admin.).

carbon dioxide (CO<sub>2</sub>) and other GHGs emitted from automobiles were “air pollutants” under the Clean Air Act and, accordingly, whether the Environmental Protection Agency (EPA) could regulate them.<sup>13</sup> The Court, in a five-to-four decision, held that GHGs fit the definition of “air pollutants” under the Clean Air Act and thus “EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”<sup>14</sup> If EPA made a formal determination that GHGs endangered the public health or welfare, the agency was required to regulate GHG emissions from motor vehicles.<sup>15</sup> The Court, however, also emphasized that EPA could regulate GHG emissions without usurping NHTSA’s fuel economy jurisdiction, writing “there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”<sup>16</sup>

Further complicating the regulatory picture was Assembly Bill 1493 (A.B. 1493), the state law passed by California in 2002 to regulate GHG emissions for passenger vehicles in that state.<sup>17</sup> Unlike every other state in the country, California enjoys an exception under the Clean Air Act in which it may set its own vehicle emissions standards if EPA grants the state a preemption waiver.<sup>18</sup> Although this exception applies only to California, once a waiver is granted, other states may adopt California’s standards as their own.<sup>19</sup> Under a waiver, although there would be only two set of regulations— federal regulations and CARB’s regulations – an automaker would have to comply with several unique and costly standards because compliance is based on the automaker’s sales fleet in a particular state.<sup>20</sup> In 2005, California petitioned EPA for a waiver to implement the emissions standards established pursuant to A.B. 1493.<sup>21</sup> In 2007, EPA denied the waiver request because it found that California “does not have a need to meet compelling and extraordinary conditions” required by the Clean Air Act.<sup>22</sup>

The Supreme Court’s decision in *Massachusetts* confused the regulatory landscape for vehicle emissions and fuel economy. The relationship between fuel economy and vehicular CO<sub>2</sub> emissions is so close that compliance tests for fuel economy standards are performed by measuring vehicular CO<sub>2</sub> emissions.<sup>23</sup> EPA Assistant Administrator Gina McCarthy told the Committee that “[g]reenhouse gases and fuel economy are technically related” in that “improvements in fuel economy are one way of achieving reductions in greenhouse gases.”<sup>24</sup> Automakers likewise agree that regulation of vehicular CO<sub>2</sub> emissions is “tantamount” to

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<sup>13</sup> See *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497 (2007).

<sup>14</sup> *Id.* at 532.

<sup>15</sup> 42 U.S.C. § 7521(a)(1).

<sup>16</sup> *Massachusetts*, 549 U.S. at 532.

<sup>17</sup> See A.B. 1493, 2001-2002 Leg., Reg. Sess., 2002 Cal. Stat. ch. 200.

<sup>18</sup> 42 U.S.C. § 7543(b)(1).

<sup>19</sup> 42 U.S.C. § 75-7.

<sup>20</sup> Nat’l Automobile Dealers Ass’n, Patchwork Proven: Why a Single National Fuel Economy Standard Is Better for America than a Patchwork of State Regulations 13 (Jan. 2009).

<sup>21</sup> Letter from Catherine Witherspoon, Exec. Officer, Cal. Air Resources Bd., to Stephen L. Johnson, Administrator, Env’tl. Prot. Agency (Dec. 21, 2005).

<sup>22</sup> Letter from Stephen L. Johnson, Administrator, Env’tl. Prot. Agency, to Arnold Schwarzenegger, Governor of the State of California (Dec. 19, 2007).

<sup>23</sup> Nat’l Auto. Dealers Ass’n, Patchwork Proven: Why a Singular National Fuel Economy Standard is Better for America than a Patchwork of State Regulations 11-12 (2009).

<sup>24</sup> Transcribed Interview of Regina McCarthy, Assistant Administrator for the Office of Air and Radiation, U.S. Env’tl. Prot. Agency, in Wash., D.C. (Dec. 22, 2011).

regulating fuel economy standards.<sup>25</sup> Accordingly, some argue that EPCA’s preemption language prevents CARB from setting fuel economy standards, regardless of whatever waiver CARB received from EPA under the Clean Air Act. Yet EPCA’s prohibition on state regulation of fuel economy has been ignored by the Administration, presumably because it would throw a wrench into its carefully orchestrated effort to bypass Congress and advance the Administration’s policy objective unobstructed by the law.

### ***Automobile Industry Preemption Lawsuits***

The Clean Air Act, through the California waiver mechanism, “essentially authorizes a ‘two-car’ country – the auto industry must meet EPA environmental emissions standards nationally, and may also need to meet even more stringent standards in California.”<sup>26</sup> As the regulation of carbon dioxide emissions is essentially the regulation of fuel economy, a waiver under these circumstances would allow California to essentially set a competing set of fuel economy standards. To forestall this outcome, in 2004, the auto industry challenged CARB’s GHG emissions regulation, arguing that the standards were preempted under EPCA.<sup>27</sup> The relevant language in EPCA provides:

When an average fuel economy standard prescribed under this chapter [49 U.S.C. § 32901 *et seq.*] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.<sup>28</sup> [emphasis added]

Under a plain reading of the statute, Congress intended to preempt state regulation of fuel economy and all regulations “relat[ing] to” fuel economy standards. This reading was endorsed by Competitive Enterprise Institute scholar Marlo Lewis, who testified at an October 2011 Subcommittee hearing: “The text of AB 1493 clearly implies that CARB is to regulate fuel economy. . . . The CARB program cannot be ‘cost effective’ unless CARB regulates fuel economy.”<sup>29</sup> Because there is a close, practical relationship between fuel economy and the emission of CO<sub>2</sub>, the auto industry argued that California’s state regulation of GHG emissions was “related to fuel economy” and therefore preempted under EPCA.<sup>30</sup> Two federal courts disagreed, however, rejecting the auto industry’s preemption arguments in 2007.<sup>31</sup>

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<sup>25</sup> See Gen. Motors, California Assembly Bill 1493 (AB 1493) Background. [**HOCCAFE153**]

<sup>26</sup> Jody Freeman, *The Obama Administration’s National Auto Policy: Lessons from the “Car Deal,”* 35 Harv. Envtl. L. Rev. 343, 350 n.42 (2011).

<sup>27</sup> See, e.g., *Cen. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

<sup>28</sup> 49 U.S.C. § 32919(a) (1975).

<sup>29</sup> “*Running on Empty: How the Obama Administration’s Green Energy Gamble Will Impact Small Business and Consumers*”: Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov’t Spending of the H. Comm. on Oversight and Gov’t Reform, 112th Cong. (2011) (testimony of Marlo Lewis).

<sup>30</sup> See Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss or Transfer, *Cen. Valley Chrysler-Jeep, Inc. v. Goldstene*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008) (No. Civ. F-04-6663).

<sup>31</sup> *Cen. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), *aff’d on reh’g*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008); *Green Mountain Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

## ***The Automobile Industry and the Auto Task Force***

In the last half of the 2000s, the American automobile industry experienced a dramatic decline in sales due to worsening economic conditions, decreased consumer demand, and high legacy costs.<sup>32</sup> In 2008, overall automobile sales fell to a twenty-six-year low, with domestic sales down eighteen percent from the previous year.<sup>33</sup> The three domestic auto manufacturers, General Motors (GM), Ford, and Chrysler – the so-called “Detroit 3” – experienced significantly more hardship than the international automakers due to their product mixes and higher pension and retirement obligations.<sup>34</sup> As a result, by late 2008, both GM and Chrysler were teetering on the edge of fiscal insolvency.<sup>35</sup> Ford, while not as financially precarious as GM and Chrysler, was also losing money.<sup>36</sup>

In February 2009, President Obama created the Presidential Task Force on the Auto Industry (“Auto Task Force”) to discuss and evaluate restructuring plans for GM and Chrysler.<sup>37</sup> The Task Force, chaired by Treasury Secretary Tim Geithner and National Economic Council Director Larry Summers, included Secretary of Transportation Ray LaHood, EPA Administrator Lisa Jackson, and White House Office of Energy and Climate Change Director Carol Browner. The Task Force also included staff members Ron Bloom, Senior Advisor on the Auto Industry at the Treasury Department; Lisa Heinzerling, Senior Climate Policy Counsel to the EPA Administrator; and Heather Zichal, Deputy Director of the White House Office of Energy and Climate Change.<sup>38</sup> Although primarily tasked with the future solvency of the domestic auto industry, each of these individuals would play a central role in negotiating the MY 2012 to 2016 or the MY 2017 to 2025 fuel economy standards.

### **ONE NATIONAL PROGRAM I: RESHAPING THE REGULATORY LANDSCAPE**

The negotiations on the auto industry bailout occurred simultaneously with the negotiations on the MY 2012 to 2016 fuel economy standards. For the new administration, the tripartite and untenable regulatory framework coupled with vulnerability of the domestic auto industry provided the President and his White House with sufficient leverage to achieve drastic concessions by the industry in agreements to increase fuel efficiency standards. The White House forced automakers to the bargaining table by raising the possibility of a regulatory patchwork posed by California’s Clean Air Act waiver. The auto industry, eager to avoid the patchwork and financially dependent on the Administration, was no match for the White House’s heavy hand.

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<sup>32</sup> Bill Canis et al., Cong. Research Serv., U.S. Motor Vehicle Industry: Federal Financial Assistance and Restructuring 2 (2009).

<sup>33</sup> *Id.* at 1-2.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 7.

<sup>37</sup> See Press Release, The White House, Geithner, Summers Convene Official Designees to Presidential Task Force on the Auto Industry (Feb. 20, 2009).

<sup>38</sup> *Id.*

## *Aspen Discussions*

In October 2008, the Aspen Institute, a Washington, D.C., think tank, convened a series of meetings with automakers, environmentalists, and the state of California to explore options for reconciling the three disparate regulatory schemes.<sup>39</sup> These confidential discussions included representatives from CARB, Ford, GM, Honda, Toyota, the Natural Resources Defense Council (NRDC), the Sierra Club, and the Union of Concerned Scientists.<sup>40</sup> The participants discussed options for a coordinated regulatory framework for fuel economy and GHG emissions, led by the state of California.<sup>41</sup> According to contemporaneous documents, all participants sought an agreement that maintained or improved emissions standards, ended all litigation surrounding the standards, and were “realistic and possible.”<sup>42</sup> The automakers pushed for one national standard with certainty, compliance flexibility, and simplicity.<sup>43</sup> The environmentalists, on the other hand, argued for a “technology forcing” agreement that “promote[d] more advanced technology into the market.”<sup>44</sup> As the Obama Transition Team began to examine these issues, the “mutual understanding” of the Aspen Discussions served as the starting point for the Administration’s first national agreement.<sup>45</sup>

In September 2008, CARB Chairman Mary Nichols testified before the Senate Committee on Environment and Public Works during a hearing on regulating GHGs under the Clean Air Act.<sup>46</sup> In her testimony, Nichols proposed five steps with which the “next President can signal a dramatic and positive shift in U.S. climate policy by judicious implementation of the Clean Air Act soon after taking office.”<sup>47</sup> Among these steps, Nichols proposed that EPA rescind its previous denial of the California waiver request, that EPA issue an endangerment determination finding that GHG emissions pose a danger to human health and welfare; and that EPA propose national emissions standards equivalent to those approved under the California waiver.<sup>48</sup> As the future bore out, and as this report will demonstrate, this approach is precisely the path that the Obama Administration followed in dictating vehicular GHG emissions.

## *Reconsideration of the California Waiver*

On January 26, 2009 – six days after taking office – President Obama ordered EPA “to immediately review the denial of the California waiver request and determine the best way forward.”<sup>49</sup> In making this announcement, the President declared:

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<sup>39</sup> See Aspen Institute, Statement on Greenhouse Gas Emissions & Fuel Economy (Jan. 29, 2009); Am. Honda Motor Co., Status of Discussions. [AHM927]

<sup>40</sup> *Id.*

<sup>41</sup> See Gen. Motors, Summary of Efforts to Achieve One National Standard for U.S. Vehicle Fuel Economy/CO2 Requirements. [HOCCAFE4088]

<sup>42</sup> Original Goals of the Discussions. [HOCCAFE433]

<sup>43</sup> *Id.* [HOCCAFE433]

<sup>44</sup> *Id.* [HOCCAFE433]

<sup>45</sup> Ford Motor Co., Handwritten Notes of Conversation among Aspen Discussion Participants (Dec. 4, 2008). [ONP2 27030-31]

<sup>46</sup> “Regulation of Greenhouse Gases under the Clean Air Act”: Hearing before the S. Comm. on Env’t. & Pub. Works, 110th Cong. (2008).

<sup>47</sup> *Id.* (testimony of Mary Nichols, Cal. Air Resources Bd.).

<sup>48</sup> *Id.*

<sup>49</sup> Remarks by the President on Jobs, Independence, and Climate Change (Jan. 26, 2009).

[T]he federal government must work with, not against, states to reduce greenhouse gas emissions. California has shown bold and bipartisan leadership through its effort to forge 21st century standards, and over a dozen states have followed its lead. But instead of serving as a partner, Washington stood in their way. This refusal to lead risks the creation of a confusing and patchwork set of standards that hurts the environment and the auto industry.

...

As we move forward, we will fully take into account the unique challenges facing the American auto industry and the taxpayer dollars that now support it. And let me be clear: Our goal is not to further burden an already struggling industry. It is to help America's automakers prepare for the future. This commitment must extend beyond the short-term assistance for businesses and workers. We must help them thrive by building the cars of tomorrow, and galvanizing a dynamic and viable industry for decades to come.<sup>50</sup>

The President's stated reasons for reconsidering the California waiver were met with skepticism by automakers. One executive expressed in an email to his colleagues: "Downright scary. NOT granting the waiver has led to the patchwork problem!?! And now the gov't knows how best to run an auto company!?!"<sup>51</sup> However, despite industry skepticism, EPA went forward with reconsidering California's waiver request. On June 30, 2009, EPA announced that, as expected, it had reversed its previous denial, granting California's request for a Clean Air Act waiver to regulate GHG emissions.<sup>52</sup> In doing so, the Obama Administration empowered the state of California – and in particular, CARB – to independently and aggressively regulate GHG emissions, apart from national standards.

The decision on the California waiver came as little surprise to Washington powerbrokers, auto industry officials, and other stakeholders. In December 2008, one auto executive speculated that "it will be hard for them to resist granting the waiver for California – especially with enormous political pressure coming from Congress and environmental groups."<sup>53</sup> In a January 2009 meeting with GM officials and United Auto Workers (UAW) lobbyist Alan Reuther, Michigan Senator Debbie Stabenow and Reuther "took the position that the waiver is essentially a done deal and [GM] need[s] to position [itself] not to continue fighting it, but rather to get federal resources to meet it."<sup>54</sup> In fact, the auto industry was so convinced that the Obama EPA would grant the California waiver that when inaccurate news of a denial was leaked, one

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<sup>50</sup> *Id.*

<sup>51</sup> Email from Tom Stricker, Toyota, to Martha Voss et al., Toyota (Jan. 26, 2009). [TOYOGRFE150-51]

<sup>52</sup> California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009).

<sup>53</sup> Email from Barbara Nocera, Mazda, to Kikkawa M. et al., Mazda (Dec. 11, 2008). [MAZDA277]

<sup>54</sup> Email from Mark L. Kemmer, Gen. Motors, to Ken W. Cole, Gen. Motors (Jan. 30, 2009). [HOCCAFE148] During her January confirmation hearings, Lisa Jackson, President Obama's pick to head the EPA, told senators that she would "aggressively" review California's application for a waiver. *Obama Moves to Revise Fuel Economy Policies*, PBS Newshour, Jan. 26, 2009.

executive responded: “HOLY CATS! Denied? Not that that’s a bad thing. But, how will I explain this to our top guys, when we’ve been saying it’s in the bag?”<sup>55</sup>

### *The White House Begins Private Discussions*

The reconsideration and subsequent granting of the California waiver was a necessary condition for the Administration’s radical reconfiguration of the fuel economy regulatory framework. With the fulcrum firmly in place, the Administration was in position to begin private deliberations designed to leverage the California waiver against the auto industry.

In February 2009, immediately after the President’s order that EPA revisit the California waiver, Carol Browner began “quietly orchestrat[ing] private discussions from the White House with auto industry officials” on a single national fuel economy and GHG emissions standard.<sup>56</sup> Using the Aspen deliberations as the basis, Browner and Nichols together explored options to regulate fuel economy and GHG emissions outside of the statutory scheme envisioned by Congress. According to one news report, Browner and Nichols deliberately shielded their work from public view, “keep[ing] their discussions as quiet as possible, holding no group meetings and taking care to not leak updates to the press.”<sup>57</sup>

The White House directed EPA to lead the process of reconciling the technical aspects of the negotiations, forcing NHTSA to a minor supporting role.<sup>58</sup> Meanwhile, the White House and the Auto Task Force – and in particular staff designees Lisa Heinzerling and Heather Zichal – took charge in engaging the automakers.<sup>59</sup> In early February, as EPA began reviewing the technical framework developed during the Aspen discussions,<sup>60</sup> the White House began holding individualized meetings with selected automakers. In February and March, Heinzerling, Carol Browner, and Jody Freeman held meetings with GM, Ford, Honda, and Toyota.<sup>61</sup> These meetings concerned “the prospects for a national solution to the GHG, fuel efficiency, and California waiver issue – the ‘big picture.’”<sup>62</sup> In these discussions, the Administration officials told the automakers that an integrated national program was “a priority for the Administration and . . . that a ‘win-win’ solution would be welcome and would set the stage for a good working relationship with the auto industry going forward.”<sup>63</sup>

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<sup>55</sup> Email from Martha Voss, Toyota, to Gloria Bergquist, Auto Alliance (Apr. 16, 2009). [TOYOGRFE207]

<sup>56</sup> Colin Sullivan, *Vow of Silence Key to White House-Calif. Fuel Economy Talks*, N.Y. Times, May 20, 2009; Neela Banerjee, *The Road to New Fuel Economy Standards Was Not Smooth*, L.A. Times, Nov. 18, 2011.

<sup>57</sup> Sullivan, *supra* note 56.

<sup>58</sup> Attachment to email from Barbara Kiss, Gen. Motors, to Maureen S. Oberc, Gen. Motors (Apr. 23, 2009). [HOCCAFE1704]

<sup>59</sup> See Gen. Motors, One National Standard – Plan of Attack [HOCCAFE1058]; Gen. Motors, “One National Standard” Public Policy Activity. [HOCCAFE1699]

<sup>60</sup> Gen. Motors, “One National Standard” Public Policy Activity. [HOCCAFE1699]

<sup>61</sup> *Id.*; [HOCCAFE1699] Email from Jo Cooper, Toyota, to Elizabeth Gibson et al., Toyota (Feb. 17, 2009); [TOYOGRFE1328] Letter from Susan M. Cischke, Ford Motor Co., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform, att. A at 2 (Dec. 19, 2011); Letter from John W. Alden, Jr., Am. Honda Motor Co., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform, att. A at 3 (Dec. 12, 2011).

<sup>62</sup> Email from Jo Cooper, Toyota, to Christopher Reynolds et al., Toyota (Mar. 2, 2009). [TOYOGRFE1329]

<sup>63</sup> *Id.* [TOYOGRFE1328]

Throughout the spring, the White House and the Auto Task Force continued to engage a small group of automakers. The auto industry had a large incentive to come to the table with the Administration: “Despite EPA vs. Massachusetts, the CAA remains an extremely poor mechanism to regulate GHG emissions . . . . The current process of having three regulatory bodies (EPA, NHTSA, and CA) regulate fuel economy is ludicrous and bad public policy.”<sup>64</sup> The automakers urged the Administration to “build upon the Aspen deliberations in an effort to harmonize the different regulatory regimes which the automakers confront.”<sup>65</sup> The White House, however, had a different goal. It sought to fundamentally reformulate the regulatory structure governing fuel economy and GHG emissions. As Carol Browner bluntly told Toyota’s Josephine Cooper during one conversation, the White House’s real aim was simple and clear-cut: “We need to get rid of that thing – CAFE.”<sup>66</sup>

By late April 2009, the Administration had developed a proposal to share with the automakers that called for a fleet average of 33.8 miles per gallon (mpg) by 2015.<sup>67</sup> As a part of the agreement, the automakers would be required to retire their legal challenges to A.B. 1493 and to pledge not to challenge a California waiver if granted by EPA.<sup>68</sup> The proposal was not well-received by all automakers. According to one executive:

[I]t seems to me that CA and EPA are getting everything in this deal, while we are getting a handshake acknowledgement that the WH “will try” to give us the things we want, but with no certainty.

For example, the emission levels they want are very real and very stringent (at least AB1493 if not higher). Plus, dropping the lawsuits is very real and very clear.

On the other hand, all the “benefits” for us in this deal are unclear and not guaranteed. [F]or example, they “hope to find ways to allow dual compliance, and they “intend” to flatten the curves, and they “plan” to give added flexibility in credits.

. . .

Despite Jody’s comments about how much they are “leaving on the table” the fact is that CA is getting EVERYTHING they want in this deal – they get their waiver, they get the same emission outcomes from CA vehicles, and the rest of the country gets much higher standards than either CAFE or CAFE+.<sup>69</sup>

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<sup>64</sup> Email from Peter Lawson, Ford Motor Co., to Katie Murtha, Office of Rep. Dingell (Feb. 1, 2011).

[**HOCCAFE6462**]

<sup>65</sup> Email from Jo Cooper, Toyota, to Elizabeth Gibson et al., Toyota (Feb. 17, 2009). [**TOYOGRFE1328**]

<sup>66</sup> See Letter from Theodore M. Hester, King & Spalding LLP, to Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (May 24, 2012) (“Toyota stipulates that a Toyota manager reported that in a conversation with Carol Browner in February 2009, Ms. Browner said, ‘We need to get rid of that thing – CAFE.’”).

<sup>67</sup> Gen. Motors, Current Status of One National Program. [**HOCCAFE1708**]

<sup>68</sup> See Freeman, *supra* note 26, at 365.

<sup>69</sup> Email from Tom Stricker, Toyota, to Jo Cooper et al., Toyota (Apr. 27, 2009). [**TOYOGRFE1331**]

Other automakers voiced similar concerns internally, with one executive lamenting that the “effective fuel economy requirements are very aggressive” and expressing concern about how CARB would act with the additional authority.<sup>70</sup>

Discussions between the White House, automakers, and CARB continued through the spring. By May 2009, the White House put forth an even tougher proposal, calling for a standard of 35.5 mpg by 2016.<sup>71</sup> According to UAW lobbyist Alan Reuther, the California waiver was a central feature of the agreement:

As we understand it, the administration will grant the California waiver. But California will be required to take legally credible action to “stand down” – ie to not implement its program, which should preclude other states from implementing their programs. The companies and others will be required to withdraw the pending lawsuits.<sup>72</sup>

In the end, under immense pressure from the Obama White House, the automakers acquiesced to the Administration’s proposal, “consent[ing] to drop all pending litigation challenging California’s legal authority to set GHG standards, and pledg[ing] not to challenge a federal preemption waiver through 2016.”<sup>73</sup>

### ***An Agreement Is Announced***

In mid-May, the White House began to finalize its agreement. Along with a draft notice of intent, the White House sent an identical pre-drafted commitment letter to each automaker, directing the companies to “review and submit a signed copy of the letter” within a strict twenty-four-hour deadline.<sup>74</sup> The White House restricted the companies’ ability to suggest edits to the document, telling them “[w]e are not in a position to negotiate the content of the letter or the Notice at this stage.”<sup>75</sup> Even at this final stage, the process remained opaque and secretive. Jack Riggs, an original participant in the Aspen discussions, admonished the group about media inquiries: “In case [a news report] leads to any reporter inquiries, I assume we are all still bound by our earlier agreement to say nothing beyond the statement we agreed upon.”<sup>76</sup>

President Obama publicly announced the agreement on May 19, 2009, in a ceremony in the White House Rose Garden.<sup>77</sup> The event, which featured representatives from ten auto

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<sup>70</sup> Email from Mark Kemmer, Gen. Motors, to Ken Cole, Gen. Motors (May 12, 2009). [HOCFAFE1853]

<sup>71</sup> Email from Alan Reuther to Peter Lawson, Ford Motor Co., et al. (May 13, 2009). [HOCFAFE1857]

<sup>72</sup> *Id.* [HOCFAFE1857]

<sup>73</sup> Freeman, *supra* note 26, at 365.

<sup>74</sup> See Email from Jody Freeman, Exec. Office of the Pres., to Elizabeth Lowery, Gen. Motors (May 16, 2009); [HOCGHG3331] Email from Jody Freeman, Exec. Office of the Pres., to Jo Cooper, Toyota (May 16, 2009). [TOYOGRFE353]

<sup>75</sup> Email from Jody Freeman, Exec. Office of the Pres., to Elizabeth Lowery, Gen. Motors (May 16, 2009). [HOCGHG3331]

<sup>76</sup> Email from Jack Riggs, Aspen Inst., to Mary Nichols, Cal. Air Resources Bd., et al. (May 18, 2009). [TOYOGRFE45]

<sup>77</sup> The White House, Remarks by the President on National Fuel Efficiency Standards (May 19, 2009).

manufacturers,<sup>78</sup> only came about as a result of the White House’s opportunistic leveraging of two critical factors. First, the Administration’s investment in GM and Chrysler gave it great leverage to force the companies to improve vehicle fuel economy without regard to cost. Automobile manufacturers, cognizant that the state of the industry gave the Administration “broad leverage to shape not only the industry’s finances but its product lines,” had already voluntarily pledged to increase fuel efficiency in their viability plans submitted to the Auto Task Force.<sup>79</sup> The White House embraced these restructuring plans, envisioning “an auto industry that is once more . . . manufacturing the fuel-efficient cars and trucks that will carry us toward an energy-independent future.”<sup>80</sup> When the Administration sought a broader agreement on increased fuel efficiency standards, the domestic automakers were in no position to disagree.<sup>81</sup>

Second, the White House successfully utilized the threat of the California waiver and the resulting patchwork of regulations to leverage automaker support.<sup>82</sup> Simply put, the California waiver and its accompanying threat for a patchwork of state regulations was a “gun to the head” of automakers, forcing them to engage the Administration on a path toward an integrated federal-state standard.<sup>83</sup> Once President Obama ordered EPA to reconsider the waiver, the auto industry became highly incentivized to negotiate an agreement in which the waiver would be moot. The fact that the waiver was a “done deal” – as Senator Stabenow and UAW’s Alan Reuther told GM in a January 2009 meeting – only further motivated the automakers to agree to the extreme standards proposed by the White House and CARB.<sup>84</sup> The industry’s greatest fear was a patchwork of varying regulations. Once EPA began to reconsider the California waiver, the automakers – both foreign and domestic – supported an agreement to prevent that patchwork from becoming a reality.<sup>85</sup>

“With the U.S. auto industry on the brink of collapse, its leaders came to see that they could no longer forestall action – and would be better off with a single, strict national rule than a state-by-state patchwork.”<sup>86</sup> These two factors – the dismal state of the domestic automobile industry and the threat of a patchwork posed by the California waiver – proved to be all the

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<sup>78</sup> The White House, Obama Administration National Fuel Efficiency Policy: Good for Consumers, Good for the Economy and Good for the Country (May 19, 2009).

<sup>79</sup> See Peter Whoriskey & Kendra Marr, *Tough Test Emerges as Administration Aims to Bolster Automakers, Cut Pollution*, Wash. Post, Mar. 4, 2009.

<sup>80</sup> The White House, Remarks by the President on the American Automotive Industry (Mar. 30, 2009).

<sup>81</sup> See, e.g., Email from Anna Schneider, Volkswagen, to David Geanacopoulos et al., Volkswagen (July 14, 2011) (“The only company that seems onboard is GM, as they need to be responsive to their shareholder . . .”).

<sup>82</sup> Under the California waiver, an automaker would have to comply with several sets of standards because compliance would have been based on the automaker’s sales fleet in a particular state. See Nat’l Automobile Dealers Ass’n, *Patchwork Proven: Why a Single National Fuel Economy Standard Is Better for America than a Patchwork of State Regulations* (Jan. 2009).

<sup>83</sup> “*Running on Empty: How the Obama Administration’s Green Energy Gamble Will Impact Small Business and Consumers*”: Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov’t Spending of the H. Comm. on Oversight and Gov’t Reform, 112th Cong. (2011) (question and answer with Jeremy Anwyl, Chief Executive Officer of Edmunds.com).

<sup>84</sup> Email from Mark Kemmer, Gen. Motors, to Ken Col, Gen. Motors (Jan. 30, 2009). [HOCCAFE148]

<sup>85</sup> Email from Peter Lawson, Ford Motor Co., to Katie Murtha, Office of Rep. Dingell (Feb. 1, 2011) (“We (the Auto Industry) supported one national standard which the White House was brokering with California, EPA, and NHTSA. The deal through 2016 was that EPA and NHTSA would develop technically equivalent standards at CA levels . . .”). [HOCCAFE6462]

<sup>86</sup> Jim Tankersley, *Auto Emissions Deal: Behind the Scenes*, L.A. Times, May 20, 2009.

leverage needed for the White House to secure industry support for the MY 2012 to 2016 standards. With the automakers on board, the Administration celebrated its coup, bypassing Congress, the media, and the public to develop a new “blueprint” for fuel economy and emissions regulation.<sup>87</sup>

### THE INTERLUDE: PLACATING CALIFORNIA

The Administration promulgated its proposed rule for the MY 2012 to 2016 standards in September 2009.<sup>88</sup> Even before the agencies had the opportunity to finalize the rule, California began to demand more. The state, empowered by EPA’s granting of the California waiver and embolden by the significant concessions it won in the first rulemaking, began to push for increased stringencies in exchange for its continued support of the agreement. The Administration, which had granted the waiver to incentivize the automakers to negotiate on a single national program, now found itself handcuffed by its own actions and forced to acquiesce to the growing demands of this run-away regulator.

EPA told the Committee that it was not aware that CARB “ever threaten[ed] to walk away from the discussions”;<sup>89</sup> however, documents reviewed by the Committee indicate that California did, in fact, attempt to exert its independence. In January 2010, the *Detroit Free Press* reported that California officials threatened to pull out of the agreement “unless federal regulators side with the state on two key disputes” pertaining to the agreement.<sup>90</sup> According to the article, CARB demanded that EPA and NHTSA lower proposed credits for zero-emissions vehicles (ZEV) and reject an automaker proposal to ease the phase-in of the standards.<sup>91</sup> The article further stated: “The warning from California has triggered concern among Detroit automakers that the state could decide to enforce its own rules for greenhouse gas emissions from cars and trucks, setting off a wave of state-by-state laws rather than the national standards set by the Obama administration.”<sup>92</sup>

Although CARB Chairman Mary Nichols disavowed the report,<sup>93</sup> concern quickly spread through the auto industry. An email between auto industry officials concluded that the state environmental agency “appears to threaten to pull out of the National Program unless EPA addresses the issues they’ve raised.”<sup>94</sup> Another auto executive hypothesized that CARB moved

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<sup>87</sup> See Freeman, *supra* note 26, at 367 (indicating that the Obama Administration “used the joint rule as a blueprint” in negotiating future emissions rulemakings).

<sup>88</sup> See Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (Sept. 28, 2009).

<sup>89</sup> Letter from Arvin Ganesan, Env’tl. Prot. Agency, to Darrell Issa, H. Comm. on Oversight & Gov’t Reform, enc. at 3 (Dec. 16, 2011). Chrysler modified its initial response to the Committee’s inquiry upon uncovering documents that “suggest Chrysler and other manufacturers construed CARB’s actions and comments . . . to constitute a threat to ‘walk away’ from negotiations.” Letter from Michael D. Bopp, Gibson Dunn, to Darrell Issa, H. Comm. on Oversight & Gov’t Reform, 3 (May 14, 2012).

<sup>90</sup> Justin Hyde, *California: May Pull Out of Fuel Economy Standard*, *Detroit Free Press*, Jan. 20, 2009.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Press Release, Cal. Air Resources Bd., ARB Restates Commitment to Establishing a National Vehicle Greenhouse Gas Standard (Jan. 20, 2010).

<sup>94</sup> Email from Steve Douglas, Auto Alliance, to Dave McCurdy, Auto Alliance (Jan. 12, 2010). [CHRYSLER OGR7720]

aggressively because it “is a bit concerned about where the politics in that state may be headed” given the upcoming gubernatorial election in which Governor Arnold Schwarzenegger, a staunch supporter of CARB, would not be a candidate.<sup>95</sup> An email from one GM executive expressed the disbelief of the industry: “Hard to believe there was any misunderstanding . . . and imagine it is a form of ‘buyer’s remorse’ as CARB and its friends have further thought about what they agreed to.”<sup>96</sup> Chrysler directly raised the issue in a meeting with EPA, telling the agency that “[i]t is difficult to tell if this is ‘saber rattling’ to keep pressure on EPA and NHTSA,” or if the industry “will need to continue litigation on federal preemption of state action on fuel economy.”<sup>97</sup>

California’s threat to pull out of the agreement spurred calls by the auto industry for “adult supervision” in the regulatory process.<sup>98</sup> “It appears,” one company wrote, that “the White House is now taking a ‘hands off’ approach and deferring implementation of National Program details to EPA and NHTSA.”<sup>99</sup> Instead of absentee leadership, one executive pressed the Administration “to take charge of the post-2016 fuel economy/CO2 regulatory discussions or the state of [California] will essentially co-opt the process.”<sup>100</sup> Another executive agreed: “EPA and NHTSA must step up and take leadership and not allow California to lead by threats.”<sup>101</sup> The White House, for its part, dismissed California’s threat as “silliness” that would not distract from the finalization of the agreement.<sup>102</sup>

Nonetheless, California’s gambit paid off as the state essentially determined the starting point for negotiations for the MY 2017 to 2025 standards. Steve Douglas, the Sacramento representative for the Alliance of Automobile Manufacturers (“Auto Alliance”), recognized that CARB’s action was an “idle threat, but [noted that] EPA is falling over themselves to satisfy ARB.”<sup>103</sup> The White House, according to one auto executive, “seemed intent on placating CARB by including some kind of range of improvement as a goal for the discussions.”<sup>104</sup> To the industry, CARB seemed poised to achieve exactly what it sought. By threats and public posturing, the state agency was positioned to dictate future regulation of national fuel economy and GHG emissions standards.<sup>105</sup>

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<sup>95</sup> Email from Michael J. Robinson, Gen. Motors, to Bob Ferguson, Gen. Motors (Feb. 3, 2010). [HOCCAFE3523]

<sup>96</sup> Email from John-Product Smith, Gen. Motors, to John Montford, Gen. Motors (Jan. 20, 2010). [HOCCAFE3430] The executive concluded by lamenting “the adverse impact [of] CARB now getting its way would have” on his company. *Id.* [HOCCAFE3430]

<sup>97</sup> Chrysler / EPA Meeting Agenda and Talking Points (Jan. 21, 2010). [CHRYSLER OGR 7716-17]

<sup>98</sup> Email from Sue Cischke, Ford Motor Co., to Bob Holycross, Ford Motor Co. (Jan. 25, 2011). [ONP2 24575]

<sup>99</sup> Chrysler / EPA Meeting Agenda and Talking Points (Jan. 21, 2010). [CHRYSLER OGR 7717]

<sup>100</sup> Email from Michael J. Robinson, Gen. Motors, to Keith Cole, Gen. Motors (Jan. 8, 2010). [HOCCAFE3352]

<sup>101</sup> Email from Reg. Modlin, Chrysler, to Robert Babik, Gen. Motors, and Robert Brown, Ford Motor Co. (May 10, 2010). [HOCCAFE4072] Another executive commented, “[s]ure would be nice if the [White House] would prevent CARB from drawing a line in the sand with their ridiculous post 2016 opening bid.” Email from Barbara Kiss, Gen. Motors, to Michael J. Robinson, Gen. Motors (Mar. 31, 2010). [HOCCAFE3681]

<sup>102</sup> Email from Gerald Roussel, Ford Motor Co., to Ziad Ojakli & Peter Lawson, Ford Motor Co. (Jan. 20, 2010). [ONP2707]

<sup>103</sup> Email from Steve Douglas, Auto Alliance, to Julie Becker, Auto Alliance (Feb. 5, 2010). [HOCCAFE3525]

<sup>104</sup> Email from Michael J. Robinson, Gen. Motors, to Thomas G. Stephens, Gen. Motors (May 8, 2010). [HOCCAFE4016]

<sup>105</sup> Email from Steve Douglas, Auto Alliance, to Robert Babik, Gen. Motors (Feb. 2, 2010). [HOCCAFE3526]

The final rule for MY 2012 to 2016 was announced on April 1, 2010, and published in the *Federal Register* on May 7, 2010.<sup>106</sup> By that time, CARB had “aggressively begun work” on fuel economy and GHG emissions standards from MY 2017 to 2025.<sup>107</sup> The Administration was therefore forced almost immediately to take some action to keep up with CARB and prevent the state regulator from prejudicing the negotiations with a highly stringent opening number.<sup>108</sup> On May 21, 2010, the White House released a “Presidential Memorandum Regarding Fuel Efficiency Standards,” directing EPA and NHTSA to work with CARB toward national fuel economy and emissions standards for MY 2017 to 2025.<sup>109</sup> The same day, President Obama held a Rose Garden ceremony to celebrate the first anniversary of the original agreement and to announce the Presidential Memorandum on the future agreement.<sup>110</sup> Although the announcement and memorandum were silent on details, EPA had sought to include – at CARB’s insistence – a range of annual stringency increases of three to six percent.<sup>111</sup> The automakers, who were already alarmed at the stringency of the first agreement, balked at this “very aggressive” and impractical rate.<sup>112</sup> CARB’s demand was “abandoned for the announcement due to the unanimous and overwhelming response from industry that this was outrageous without having conducted any serious technical discussions.”<sup>113</sup>

Yet California continued to insist on an annual three-to-six-percent stringency increase. In its press statement praising the Presidential Memorandum, CARB lauded the agreement and stated its “expectation” that “the annual rate of improvement would be in the 3 to 6 percent range.”<sup>114</sup> Predictably, the industry did not approve of CARB’s uninvited dictation of future terms – terms that had not even been proposed to the industry. As one executive opined, “[t]his is their way of telling us and uncle Same [*sic*] ‘we’re still in charge’ and if the [representatives of the federal government] don’t send the right signals – immediately – that’s the way we can expect them to behave throughout.”<sup>115</sup> Another executive was more succinct: “Not surprised that California screwed us all with the inclusion of the floor of 3-6%.”<sup>116</sup>

Following the President’s announcement in May, the automakers began meeting individually with EPA, NHTSA, and CARB for preliminary discussions on the second round of standards.<sup>117</sup> According to documents recounting these meetings, the Administration did not

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<sup>106</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

<sup>107</sup> See Gen. Motors, Legislative and Regulatory Issues Update. [HOCCAFE4133]

<sup>108</sup> Handwritten Notes of Phone Call among Ford Motor Co., Gary Guzy, Ron Medford, and Margo Oge (May 6, 2010) (“California is out there – Bring them in? If serious purposes/meaningful outcome, relatively quick before they go off.”). [ONP2 27924]

<sup>109</sup> See The White House, Presidential Memorandum Regarding Fuel Efficiency Standards (May 21, 2010).

<sup>110</sup> The White House, Remarks by the President at Signing of Presidential Memorandum on Fuel Efficiency Standards (May 21, 2010).

<sup>111</sup> See Gen. Motors, Legislative and Regulatory Issues Update. [HOCCAFE4133]

<sup>112</sup> *Id.*; [HOCCAFE4133] Mazda, Handwritten Notes. [MAZDA34]

<sup>113</sup> Gen. Motors, Legislative and Regulatory Issues Update. [HOCCAFE4133]

<sup>114</sup> Press Release, Cal. Air Resources Bd., Statement of the California Air Resources Board Regarding Future Passenger Vehicle Greenhouse Gas Emission Standards (May 21, 2010).

<sup>115</sup> Email from Michael J. Robinson, Gen. Motors, to Barbara Kiss, Gen. Motors (May 24, 2010). [HOCCAFE4193]

<sup>116</sup> Email from Barbara Kiss, Gen. Motors, to Michael J. Robinson et al., Gen. Motors (May 24, 2010). [HOCCAFE4187]

<sup>117</sup> See, e.g., Gen. Motors, Key Messages for 10JUN10 EPA/NHTSA/CARB mtg. [HOCCAFE4410]

take the automakers' input seriously. "[I]n spite of repeated requests for more follow up discussion/collaboration by . . . every [automaker]," one executive reported, the Administration has "avoided the next stage of review."<sup>118</sup> Instead, the Administration issued a Notice of Intent (NOI) in September 2010, ostensibly to describe the agencies' preliminary assessment, but in reality to keep California "at the table" and not acting unilaterally.<sup>119</sup> Although the automakers asked the Administration to avoid specific targets in the NOI,<sup>120</sup> the Administration "felt compelled" to include CARB's demand for a preliminary range of three-to-six percent annual improvement.<sup>121</sup>

Even then, with the three-to-six percent floor that it sought, CARB was not satisfied. The state regulator began to consider using its waiver authority to issue separate emissions standards at a higher stringency than the national standards. An internal CARB email illustrates the agency's thinking: "Between just us folks, we are going to have a tough time requiring 6% per year improvement and I think [CARB Chief Deputy Executive Officer] Tom [Cackette] is looking for a way to separate out the [zero-emissions vehicle] proposal again and use it to require 6% still in CA but something less year over year nationally and still be able to say we have a single national standard."<sup>122</sup> CARB also insisted on moving forward quickly, with Cackette reportedly telling one EPA official: "[W]e've got time for maybe one kabuki theatre show and then we gotta get the standards set."<sup>123</sup>

The aggressive stringencies and fast pace of CARB's goals were of considerable concern to the auto industry. As Dave McCurdy, President of the Auto Alliance, wrote to one executive:

We need to push back now or face a higher number. The left, along with the states, is waging a serious campaign. We cannot assume anything and shouldn't believe EPA will base the decision on credible data – they will justify any range. It is becoming increasingly political and EPA is aligning with CA. Meanwhile, the Secretary of Transportation has abandoned the fuel economy playing field.

...

It is up to us to stand up for the economy and consumer choice. We should be rewarded, not punished, for cooperating with the Administration and we have to remind them in a public way.<sup>124</sup> [emphasis added]

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<sup>118</sup> Email from Michael J. Robinson, Gen. Motors, to Thomas G. Stephens, Gen. Motors (Sept. 30, 2010).

[HOCCAFE13562]

<sup>119</sup> *Id.*; [HOCCAFE13562] see 2017 and Later Model Year Light Duty Vehicle GHG Emissions and CAFE Standards; Notice of Intent, 75 Fed. Reg. 62,739 (Oct. 13, 2010).

<sup>120</sup> Email from Annette J. Guarisco, Gen. Motors, to Bob Ferguson, Gen. Motors (Sept. 17, 2010).

[HOCCAFE4719]

<sup>121</sup> Email from Michael J. Robinson, Gen. Motors, to Thomas G. Stephens, Gen. Motors (Sept. 30, 2010).

[HOCCAFE13562]

<sup>122</sup> Email from Steve Albu, Cal. Air Resources Bd., to Joshua Cunningham & Paul Hughes, Cal. Air Resources Bd. (Nov. 1, 2010). [CARB14935]

<sup>123</sup> Email from Barbara Kiss, Gen. Motors, to Michael J. Robinson, Gen. Motors (May 24, 2010).

[HOCCAFE4202]

<sup>124</sup> Email from Dave McCurdy, Auto Alliance, to Bob Ferguson, Gen. Motors (Oct. 21, 2010). [HOCCAFE5759]

Clearly, the industry was not pleased with the rogue actions of CARB or the utter failure of the Administration to control its negotiation process.

The interlude between the two fuel economy and emissions regulations showcased the true dynamics of the Administration's fragile fuel economy and GHG emissions coalition. It was a period in which CARB, emboldened by the California waiver and the concessions it had gained, kept pushing for more. The Obama Administration, which empowered California to entice automaker support for one national program, now found itself forced to appease the state over and above all other considerations. The White House's reluctance to reign in California clearly irritated the auto manufacturers: "Everyone involved among the [automakers] is frustrated by this handling by the WH, but we gain nothing by publicly grouching or simply walking away at this point."<sup>125</sup> Constrained as they were, the automobile industry continued to walk hand-in-hand with the Obama Administration.

## **ONE NATIONAL PROGRAM II: RIVALRIES, INCENTIVES, AND INEQUITIES**

Bound by the terms and timeline of the notice of intent, and pressured by the maneuvering of California, the Administration moved forward to find support for a second round of fuel economy and GHG emissions regulations.<sup>126</sup> This time EPA and CARB aligned to dilute NHTSA's influence in the process.

### ***Auto Alliance Letter to Chairman Issa***

In December 2010, then-Ranking Member Issa sent letters to over 200 business and trade groups, including the Auto Alliance, seeking "assistance in identifying existing and proposed regulations that have negatively impacted job growth."<sup>127</sup> The Auto Alliance responded on January 11, 2011, stating that "fuel economy standards are by far the most expensive regulations automakers face."<sup>128</sup> Highlighting CARB's cavalier attitude, the letter further stated that although CARB participated in the first agreement and the NOI and the technical assessment report for the second round, "it appears that CARB intends to pursue the development of its own separate rules for MY 2017-2025 light-duty vehicles."<sup>129</sup> "Such unilateral action by California is of great concern," the letter continued, "in particular, a rushed effort toward a state rulemaking is not in the spirit of a collaborative effort to develop a single national program for fuel economy/GHG standards."<sup>130</sup>

The Auto Alliance letter sparked an outburst of indignation from CARB. In an email to Auto Alliance Vice President Julie Becker, CARB Chairman Mary Nichols wrote: "Based on the ongoing contact between your members and the government agencies, I find your letter

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<sup>125</sup> Email from Michael J. Robinson, Gen. Motors, to Thomas G. Stephens, Gen. Motors (Sept. 30, 2010).

**[HOCCAFE13562-63]**

<sup>126</sup> See, e.g., Gen Motors, Legislative and Regulatory Update (Oct. 25, 2010). **[HOCCAFE5774]**

<sup>127</sup> See, e.g., Letter from Darrell Issa, Ranking Member, H. Comm. on Oversight & Gov't Reform, to Dave McCurdy, Alliance of Automobile Manufacturers (Dec. 29, 2010).

<sup>128</sup> See Letter from Shane Karr, Alliance of Automotive Manufacturers, to Darrell Issa, H. Comm. on Oversight & Gov't Reform (Jan. 11, 2011).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

complaining about timing to be quite disingenuous. . . . I can only imagine what motivated the complaint to Mr. Issa, but on its surface this seems to signal the opening round of a new challenge to California's authority under the Clean Air Act."<sup>131</sup>

The Administration reacted strongly to the letter, with White House staff scheduling meetings with Alliance members and with EPA Administrator Jackson signaling her intention to take a more direct role in the negotiations.<sup>132</sup> The letter eventually prompted the Administration and CARB to announce on January 24, 2011, an agreement for "a single timeframe for proposing fuel economy and greenhouse gas standards for model year 2017-2025 cars and light-duty trucks."<sup>133</sup> The announcement, hailed by the industry as an indication that "the adults finally showed up,"<sup>134</sup> could not heal the budding fractures in the White House's coalition. In the words of one auto executive: "This is a good development on timing . . . but they need to do the same over the substantive content of the future rule. We're not there yet, but the other guy just blinked."<sup>135</sup>

The working relationship between the automakers and California continued to deteriorate. In February 2011, Nichols sent a letter to the chief executives of seven Alliance members, expressing alarm at the Alliance letter to Chairman Issa and demanding that the companies "distance [themselves] from future efforts by the Alliance to undermine the achievement of our mutual goals."<sup>136</sup> Her letter was not well-received. One executive, in forwarding Nichol's letter to a colleague, opined: "Could this be called fear of sunshine?"<sup>137</sup> Another executive, in discussing the letter, remarked that it "[l]ooks like the Alliance letter hit a nerve."<sup>138</sup> Shane Karr, the Auto Alliance official who authored the letter that upset Nichols, was even more direct, writing to a congressional staff member:

I'm sure you've already heard from some of my members, but this is exactly why we are having trouble disavowing an opportunity (however slim) to put an end to the nonsense from this group of petty state officials. Between you and me, we would be OK with EPA continuing to have authority to regulate vehicle GHG, but at some point, we are going to have to try to wrestle this gun that California has to the industry's head out of their hands, even if we risk getting shot in the process . . .<sup>139</sup> [emphasis added]

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<sup>131</sup> Email from Mary Nichols, Cal. Air Resources Bd., to Julie Becker, Auto Alliance (Jan. 13, 2011). [HOCCAFE6190]

<sup>132</sup> See Email from Shane Karr, Auto Alliance, to PRES Regular Executive Committee (Jan. 12, 2011).

[HOCCAFE6190]

<sup>133</sup> Press Release, EPA, DOT, and California Align Timeframes for Proposing Standards for Next Generation of Clean Cars (Jan. 24, 2011).

<sup>134</sup> Email from Michael J. Robinson, Gen. Motors, to Steve O'Toole & Mark L. Kemmer, Gen. Motors (Jan. 24, 2011). [HOCCAFE6274]

<sup>135</sup> Email from Michael J. Robinson, Gen. Motors, to Bob Ferguson, Gen. Motors (Jan. 24, 2011).

[HOCCAFE6261]

<sup>136</sup> Letter from Mary D. Nichols, Cal. Air Resources Bd., to Chief Executives of General Motors Corp., Chrysler Group LLC, Ford Motor Co., BMW, Toyota Motor Corp., Volkswagen AG, & Mercedes-Benz (Feb. 7, 2011).

<sup>137</sup> Email from Coleman Jones, Gen. Motors, to Robert F. Babik, Gen. Motors (Feb. 7, 2011). [HOCCAFE6815]

<sup>138</sup> Email from Michael J. Robinson, Gen. Motors, to Bob Ferguson, Gen. Motors (Feb. 8, 2011).

[HOCCAFE6866]

<sup>139</sup> Email from Shane Karr, Auto Alliance, to Katie Murtha, Rep. Dingell's Office (Feb. 8, 2011).

[HOCCAFE6872]

## *Rising Influence of Environmental Special Interest Groups*

As the discussions on the second round of standards progressed, the parties to the negotiations became increasingly polarized. The incentives motivating the three regulatory bodies – EPA, NHTSA, and CARB – shifted out of alignment as environmental interest groups lobbied EPA and CARB for more stringent standards and as NHTSA struggled to meet its statutory duty with regard to setting fuel economy regulation.

Environmental interest groups played a large – and mostly unseen – role in shaping both rounds of national fuel economy and GHG emissions standards. Roland Hwang of the NRDC was an active participant in the 2008 Aspen Discussions, which also included Jack Riggs of the Aspen Institute, Ann Mesnikoff of the Sierra Club, and David Friedman of the Union of Concerned Scientists.<sup>140</sup> From the beginning of the Aspen discussions, these environmental interests fought hard for stringent standards that would “promote more advanced technology into the market.”<sup>141</sup> They refused to compromise in the discussions, prompting complaints that their noncooperation was “ridiculous.”<sup>142</sup> Their entrenched stance was summarized by one participant to the discussions as “[j]ust emotion” without logic.<sup>143</sup>

In 2011, as the Obama Administration and CARB negotiated the second round of fuel economy and GHG emissions standards with automakers, the environmental lobby was no less persistent in pressing for more stringent standards. According to a report by the *New York Times*, the environmentalists even “pledge[d] to push California to revive its separate clean-car mandates,” which California had promised not to pursue, if the second round of standards were not sufficiently stringent.<sup>144</sup> In the words of Dan Becker, director of the Safe Climate Campaign at the Center for Auto Safety: “California is the shotgun in the closet, because it has the right to set its own emission standards . . . . [T]he threat of a separate California program can ensure that the loopholes [in the agreement] go away” [emphasis added].<sup>145</sup> CARB did nothing to quell speculation that it would go its own way, proudly proclaiming: “We retain authority under the Clean Air Act to set stricter than federal standards. We would use an E.P.A. waiver to enforce our state regulations.”<sup>146</sup>

Under pressure from the environmental lobby, EPA and CARB became increasingly responsive to special interests’ demands. Environmentalists, and in particular the NRDC, regularly advised EPA and CARB on the terms of the developing agreement. In one email,

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<sup>140</sup> See Email from Jack Riggs, Aspen Inst., to David Friedman, Union of Concerned Scientists, et al. (Oct. 29, 2008). [AHM234]

<sup>141</sup> Aspen Discussions – Summary for Participants (Draft Jan. 30, 2009). [AHM844]

<sup>142</sup> Email from Robert Bienenfeld, Am. Honda Motor Co., to Sue Cischke, Ford Motor Co. (Jan. 28, 2009). [AHM810]

<sup>143</sup> Email from Robert Bienenfeld, Am. Honda Motor Co., to Barbara Kiss, Gen. Motors (Jan. 21, 2009). [AHM 695]

<sup>144</sup> Jim Montavalli, *On Fuel Economy, Environmental Groups May Urge California to Go it Alone*, N.Y. Times, June 29, 2011.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

David Doniger of NRDC wrote to several CARB officials, including Chairwoman Mary Nichols, about the mid-term evaluation provision of the agreement:

I am concerned that CA is giving up too much leverage in the midterm review. The way the text is now drafted, if EPA decides to weaken the 22-25 rule, then you are automatically pulled along . . . . [An alternative] leaves you some leverage and some ability, in a deep disagreement scenario, to stay your course unless EPA affirmatively overrides you. This is important to preserving your independence and the leverage it provides you and us.<sup>147</sup>

After discussing the issue with Doniger and CARB staff, Mary Nichols emailed EPA's Gina McCarthy and Gary Guzy, the Deputy Director of the White House Council on Environmental Quality, to request a further review of the previously agreed-upon mid-term evaluation language. Nichols forwarded Doniger's email to them, writing "I think [the language] goes farther than it should in committing that CARB must seek a new waiver if we disagree with EPA in 2019 on whether the standards need to be weakened."<sup>148</sup>

### ***Sidelining NHTSA***

The two environmental regulators became increasingly synchronized to the exclusion of the one entity specifically charged by Congress with statutory responsibility to set fuel economy: NHTSA. As early as August 2010, EPA and CARB began aligning against NHTSA. In response to one NHTSA email with recommendations for inputs to a CAFE model analysis, EPA official William Charmley wrote to several EPA and CARB staffers: "I cannot believe this email note. It is August 17, we made most of these decisions 4 to 6 weeks ago. I guess I will listen to Jim for a few minutes, but for the most part I guess I will simply say we have no idea how they can come up with all of these new recommendations so late in the process, and we don't intend to do anything with any of them."<sup>149</sup> This dynamic dominated discussions throughout the summer of 2011, as EPA and CARB worked closely together and, often times, at odds with NHTSA.

EPA began seeking CARB's approval on routine decisions, as in the days before the announcement when McCarthy wrote to Nichols: "Mary – last issue on midterm has arisen. Need to make a decision this morning. Would like to make sure I run it by you. Can you call when you have 5 minutes" [emphasis added].<sup>150</sup> The relationship was so close that the two

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<sup>147</sup> Email from David Doniger, Natural Resources Defense Council, to Tom Cackette & Ellen Peter, Cal. Air Resources Bd. (July 27, 2011). [EPA DOC – NO BATES]

<sup>148</sup> Email from Mary Nichols, Cal. Air Resources Bd., to Gina McCarthy, Env'tl. Prot. Agency, & Gary Guzy, Exec. Office of the Pres. (July 27, 2011). [EPA DOC – NO BATES] This was not the only instance of deference to and collusion with environmental special interests. In the final days before the announcement of the agreement, Mary Nichols promised NRDC's Ronald Hwang "that there would not be an announcement before enviros were briefed." Email from Mary Nichols, Cal. Air Resources Bd., to Gary Guzy, Exec. Office of the Pres. (July 14, 2011). [EPA DOC – NO BATES]

<sup>149</sup> Email from William Charmley, Env'tl. Prot. Agency, to Steve Albu, Cal. Air Resources Bd., et al. (Aug. 17, 2010). [CARB14687]

<sup>150</sup> Email from Gina McCarthy, Env'tl. Prot. Agency, to Mary Nichols, Cal. Air Resources Bd. (July 26, 2011). [EPA DOC – NO BATES]

regulators often spoke with a unified voice, as evidenced by an email from McCarthy to Nichols: “I need to get you, me and Margo [Oge] on the phone for a gut check.”<sup>151</sup> In another email to McCarthy about a meeting in June 2011, Nichols summarized the environmental regulators’ mutual disdain for NHTSA: “As I looked over at you a couple of times during the meeting I thought you looked tired ... or maybe just fed up. I don’t blame you. Too many people sitting around. It reminded me once again how hard it is to get people to stop posturing and get something done. And [NHTSA Administrator] Strickland’s comments were actually quite outrageous.”<sup>152</sup> In short, the EPA-CARB alliance – epitomized by Nichols’s comment to McCarthy that “we are all in this together”<sup>153</sup> – substantially shaped the tenor of the negotiations, pitting the environmental regulators against NHTSA.

The auto industry took notice of the alliance between EPA and CARB, as well as the environmental regulators’ increasing contempt for NHTSA. As one executive reported to his colleagues, “[t]here continues to be more and more tension between EPA and NHTSA.”<sup>154</sup> The White House overtly embraced the alliance between EPA and CARB. The White House preferred to work more closely with EPA and CARB than it did with NHTSA. Gary Guzy, the Deputy Director of the White House’s Council on Environmental Quality, regularly reported to CARB Chairman Mary Nichols on the progress of negotiations, as he did in one email dated July 27, 2011 – just days before the public announcement – when he wrote to “update” Nichols on the “good progress” of discussions with automakers.<sup>155</sup> Although Guzy copied Gina McCarthy of EPA on the email, he excluded any representative of NHTSA. The omission was not an isolated incident. Indeed, the next day, July 28, Guzy emailed Nichols and McCarthy with the subject “Can Gina & I hop on phone with you ASAP? Thanks Mary.”<sup>156</sup> NHTSA was not asked to join the phone call.

Not surprisingly, the dynamics created an environment in which CARB and NHTSA were very much at odds. In October 2010, when discussing NHTSA’s request to add additional information to a supplemental notice of intent, CARB asked EPA for permission to join the conference call to “act as a counterweight to NHTSA’s proposals.”<sup>157</sup> In another dispute on cost assessment, Tom Cackette of CARB captured the adversarial nature of the relationship, writing to Mary Nichols and others that “if they win this one we will lose the rest.”<sup>158</sup> With a growing fissure between the environmental regulators and NHTSA, and the White House siding with the

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<sup>151</sup> Email from Gina McCarthy, Env’tl. Prot. Agency, to Mary Nichols, Cal. Air Resources Bd. (June 8, 2011).

**[EPA DOC – NO BATES]**

<sup>152</sup> Email from Mary Nichols, Cal. Air Resources Bd., to Gina McCarthy, Env’tl. Prot. Agency (June 14, 2011).

**[EPA DOC – NO BATES]**

<sup>153</sup> Email from Mary Nichols, Cal. Air Resources Bd., to Gina McCarthy, Env’tl. Prot. Agency (July 10, 2011).

**[EPA DOC – NO BATES]**

<sup>154</sup> Email from Nick Tamborra, Volkswagen, to Stuart Johnson & Christoph Kohnen, Volkswagen (May 11, 2011).

**[VWGOA89]**

<sup>155</sup> See, e.g., Email from Gary Guzy, Exec. Office of the Pres., to Mary Nichols, Cal. Air Resources Bd. (July 27, 2011). **[EPA DOC – NO BATES]**

<sup>156</sup> Email from Gary Guzy, Exec. Office of the Pres., to Mary Nichols, Cal. Air Resources Bd. (July 28, 2011).

**[EPA DOC – NO BATES]**

<sup>157</sup> Email from Paul Hughes, Cal. Air Resources Bd., to Tom Cackette, Cal. Air Resources Bd. (Oct. 21, 2010).

**[CARB15733]**

<sup>158</sup> Email from Tom Cackette, Cal. Air Resources Bd., to Mary Nichols, Cal. Air Resources Bd., et al. (Mar. 27, 2011). **[CARB15720]**

environmentalists, the result was a steady de-emphasis on NHTSA's expertise in safety, costs, and consumer preference and a corresponding overemphasis on environmental stringency.

### ***Ron Bloom Takes Over Negotiations, Strategically Engaging Manufacturers***

Discussions on the second round of standards intensified in the late spring and early summer of 2011. Although the White House told the Committee that it performed merely a “coordinating function” in these negotiations,<sup>159</sup> documents obtained by the Committee demonstrate that its role was far more substantive.

In early May 2011, President Obama asked Ron Bloom, then serving at the White House as the Assistant to the President for Manufacturing Policy, to get directly involved in the negotiations.<sup>160</sup> Bloom had previously served as the head of the Obama Administration's Auto Task Force, where he was responsible for supervising the bailouts of GM and Chrysler.<sup>161</sup> Auto executives welcomed his intervention as “adult supervision” in the process, but they also worried that his involvement would “tilt[] the table to benefit domestics” and the United Auto Workers.<sup>162</sup> Bloom described his role as an “‘advisor’ to help the White House balance the issues raised by EPA, NHTSA, CARB, and the industry”; however, to the industry it was clear “that Bloom ha[d] been tasked to broker a ‘deal.’”<sup>163</sup> The Obama White House, which invested so much political capital into the domestic auto manufacturers, simply could not allow the clashing regulators to hasten the failure of its delicate negotiations.<sup>164</sup>

The White House began facilitating meetings between EPA, NHTSA, CARB, and certain auto manufacturers. Like the first round of negotiations in 2009, the Administration imposed a vow of silence, only communicating orally with automakers and “stress[ing] to each [automaker] that they need to treat these discussions as confidential and that their failure to do so jeopardizes our ability to engage them and be flexible in setting the standards and associated flexibilities.”<sup>165</sup> This directive is also reflected in notes from one automaker's meeting with the Administration, where it was told of the “[n]eed to avoid writing.”<sup>166</sup>

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<sup>159</sup> Letter from Kathryn H. Ruemmler, White House Counsel, to Darrell Issa, H. Comm. on Oversight & Gov't Reform (Mar. 14, 2012).

<sup>160</sup> Email from Jim Lentz, Toyota, to Tom Lehner & Dian Ogilvie, Toyota (May 11, 2011); [TOYOGRFE1316-17] Letter from Jake Jones, Daimler, to Darrell Issa, H. Comm. on Oversight & Gov't Reform 4 (Dec. 22, 2011) (“Bloom became the lead point person in the discussions about the 2017 – 2025 GHG regulation.”).

<sup>161</sup> See generally “*Lasting Implications of the General Motors Bailout*”: Hearing before the Subcomm. on Reg. Affairs, Stimulus Oversight & Gov't Spending of the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2011).

<sup>162</sup> Email exchange between Jim Lentz, Toyota, to Tom Lehner, Toyota (May 11-12, 2011). [TOYOGRFE1315-16]

<sup>163</sup> Email from Tom Lehner, Toyota, to Jim Lentz, Toyota, et al. (May 13, 2011). [TOYOGRFE1336]

<sup>164</sup> See Email from Mark L. Kemmer, Gen. Motors, to Bob Ferguson, Gen. Motors (June 22, 2011) (“WH is invested in the success of the auto industry, so do not want to jeopardize that.”). [HOCCAFE13602]

<sup>165</sup> Email from Kathryn Thomson, Dep't of Transp., to Gina McCarthy, Env'tl. Prot. Agency, et al. (Jun. 15, 2011). [CARB 14386]

<sup>166</sup> Toyota, Handwritten Notes accompanying June 29, 2011, meeting with White House (June 29, 2011). [TOYOGRFE1342]

With Bloom at the helm, the Administration strongly favored the interests of the three domestic auto manufacturers. The Big Three were routinely contacted first and were afforded greater access to EPA and NHTSA data. According to an internal email obtained from NHTSA:

With respect to schedule (and subject to White House agreement), we suggest that we make the initial calls to the Detroit 3 tomorrow (Thursday), provide them with the EPA and NHTSA curves . . . . [W]e need to do outreach to all of the other major manufacturers prior to determining stringencies on or before June 30. However, we believe that these discussions should take place at a much more general level and should convey what we propose the stringencies might be after engaging the Detroit 3.<sup>167</sup>

A subsequent account from Ford confirms the Administration's disparate process: "So far the [White House], EPA, NHTSA, and CARB have had two meetings with us, GM, and Chrysler and are meeting with the importers the first time this week. The [White House] is running the meetings and the ball is in their court now."<sup>168</sup> Indeed, the White House relied heavily on Ford to carry its water with the auto industry and Ford recognized that it had "more clout" in this round of negotiations.<sup>169</sup> Early in the process, in September 2010, Ford expressed its support for a range of stringency improvements in the NOI when the other domestic companies voiced opposition to the range.<sup>170</sup> Ford was better suited to meet these stringent standards than the other domestic automakers,<sup>171</sup> and its support for the range was certainly appreciated by the White House. Contemporaneous documents show a repeated and close relationship between Ron Bloom and senior Ford executives in the weeks leading up to the announcement of the agreement.<sup>172</sup> Yet Ford was not the only domestic automaker with almost unlimited access to the White House. According to these documents, Ron Bloom was in constant contact with GM's Bob Ferguson in the period leading up to the President's announcement.<sup>173</sup>

These documents demonstrate the White House's "divide and conquer" approach to automaker outreach, engaging the companies individually and providing differing information to each company.<sup>174</sup> "The gov't is playing we [automakers] off of each other. They are telling us lies (we know cause we [automakers] talk amongst ourselves) to trick us into caving or giving us points [of] information. The entire exercise is focused on finding a way to get us to the previously announced 56mpg (5% per year for both car an[d] truck) in 2025."<sup>175</sup> This

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<sup>167</sup> Email from Kathryn Thomson, Dep't of Transp., to Gina McCarthy, Env'tl. Prot. Agency, et al. (Jun. 15, 2011). **[CARB 14386]**

<sup>168</sup> Email from Susan M. Cischke, Ford Motor Co., to Alan Mulally, Ford Motor Co. (July 1, 2011). **[ONP22]**

<sup>169</sup> *Id.* ("Based on the process last time, I do think we are in good shape in the discussion . . . and this time, we have more clout."). **[ONP22]**

<sup>170</sup> *See* Email exchange between Gerald Roussel, Ford Motor Co., and Ziad Ojakli, Ford Motor Co. (Sept. 29, 2010). **[ONP3783]**

<sup>171</sup> Email from Sue Cischke, Ford Motor Co., to Ziad Ojakli, Ford Motor Co. (July 18, 2011). **[ONP2 37922]**

<sup>172</sup> *See, e.g.*, Email exchange between Ziad Ojakli, Ford Motor Co., and Ron Bloom, Exec. Office of the Pres. (July 26, 2011); **[ONP3834]** Email exchange between Ron Bloom, Exec. Office of the Pres., and Ziad Ojakli, Ford Motor Co. (July 27, 2011). **[ONP3851]**

<sup>173</sup> Email from Dwight Brown, Gen. Motors, to Mary Sipes, Gen. Motors (July 15, 2011). **[HOCCAFE12101]**

<sup>174</sup> Email from Tom Lehner, Toyota, to Kazuo Abe et al., Toyota (July 7, 2011) ("Government is trying to pressure each company into an agreement with divide and conquer approach."). **[TOYOGRFE1343-44]**

<sup>175</sup> Email from Dwight Brown, Gen. Motors, to Mary Sipes, Gen. Motors (July 15, 2011). **[HOCCAFE12101]**

unbalanced and inequitable approach to stakeholder engagement was confirmed by another auto executive. In an email preparing the company’s chief executive officer for a phone call with Bloom, the executive warned that the White House “ha[s] bee trying to play one company off another – so if he tells you others have agreed, don’t buy it.”<sup>176</sup>

As the negotiations intensified, the White House focused on securing the support of a select “few” auto companies to pressure the others to agree.<sup>177</sup> During the week of July 11, 2011 – merely two weeks before the announcement – the Administration met with representatives of Ford, GM, Chrysler, Hyundai, Honda, Toyota, Jaguar Land Rover, Nissan, and Volkswagen. Some of these meetings were arranged by the White House with little advanced notice, no discussion on the companies’ availability, and on essentially a “take it or leave it” basis.<sup>178</sup> The rush was entirely politically motivated. As one EPA official told auto executives, the Administration needed to do a final rule before the 2012 presidential elections because the President “wants to secure his legacy.”<sup>179</sup>

### *Inducing Support through Incentives and Enticements*

The White House aimed to announce a “conceptual agreement” by July 15, despite a “perception that the broad conceptual agreement is unlikely to come together.”<sup>180</sup> This is likely why Bloom and the White House adopted an increasingly heavy hand with the automakers. According to a recount of a meeting with Toyota, “Bloom emphasized that if companies don’t disagree [with Administration proposals], [the] government will assume proposals are acceptable.”<sup>181</sup> Bloom also told Toyota executives that “promulgating standards through 2025 is non-negotiable” because of the White House’s commitments to EPA and CARB.<sup>182</sup> When Toyota responded that the Administration’s proposed stringency was not feasible, Bloom scornfully threatened that “Toyota ha[d] always been [a fuel economy] leader, but seems on [a] path to be a laggard.”<sup>183</sup>

In a similar meeting, representatives from GM explained to Administration officials how their proposal was “overly aggressive” and commercially unworkable.<sup>184</sup> “[A]fter lengthy discussions . . . the Admin reps (and Mary Nichols of CARB) eventually fell back on the point that they need an aggressive number – and one that will ‘force’ substantial and increasing numbers of advanced technology vehicles into the market; the cost of those vehicles (to customers and/or to the automakers) was clearly not a significant concern of the regulators” [emphasis added].<sup>185</sup>

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<sup>176</sup> Email from Tom Lehner, Toyota, to Jim Lentz & Dian Ogilvie, Toyota (July 16, 2011). [TOYOGRFE1348]

<sup>177</sup> Email from Robert Bienenfeld, Am. Honda Motor Co., to Ed Nam, Evtl. Prot. Agency (July 13, 2011) (“Ron Bloom said you are working with just a few companies, and Honda is one of them.”); [EPA DOC – NO BATES] Email from Barbara Nocera, Mazda, to Keiko Takihana, Mazda (July 7, 2011). [MAZDA287]

<sup>178</sup> Email from Stuart Johnson, Volkswagen, to Christoph Kohnen, Volkswagen (July 10, 2011). [VWGOA201]

<sup>179</sup> Mazda, Handwritten Notes. [MAZDA33-35]

<sup>180</sup> Email from Greg Mastel, Dutko Worldwide, to Brad Card et al. (July 7, 2011). [HOCCAFE11456]

<sup>181</sup> Email from Tom Lehner, Toyota, to Kazuo Abe et al., Toyota (July 7, 2011). [TOYOGRFE1343-44]

<sup>182</sup> *Id.* [TOYOGRFE1343-44]

<sup>183</sup> *Id.* [TOYOGRFE1343-44]

<sup>184</sup> Email from Mark L. Kemmer, Gen. Motors, to Bob Ferguson, Gen. Motors (June 22, 2011). [HOCCAFE13602]

<sup>185</sup> *Id.* [HOCCAFE13602]

The speed of the Administration’s negotiations and its disregard for the consequences of the mandate show that the White House was focused more on a politically “attractive number” than it was on sound public policy.<sup>186</sup> In setting the standards for MY 2017 to 2025, the White House allowed CARB and the environmental special interests to dictate the stringency. As early as May 2010, CARB pressed for a range of annual improvements between three and five percent. As the Administration entered detailed discussions with automakers, it provided a “working model” with five percent stringency per year and explained that “the burden will be on the [automakers] to prove that the 5% [model] is unattainable.”<sup>187</sup> While acknowledging that the target would be difficult for automakers to meet, the Administration proceeded with an eye towards the “headline and number” with “flexibility factors” designed to assist the automakers in complying with the rigorous “headline.”<sup>188</sup>

Even more remarkable, the Administration flatly ignored questions from the automakers about the Administration’s technical assessments supporting its proposal. As recounted by one executive to the White House’s Gary Guzy:

I had a pretty clear understanding . . . that the technical review today would afford our people a chance to get more detail to better understand how the government came to the calculations you showed us the other day. However, I was very disappointed to hear from my team that they were really not afforded that chance. Margo [Oge] and Tom [Cackette] spent a considerable part of the conversation offering opinions and asking answers from my team on our own assumptions and calculations rather than using the time to have her people provide any meaningful inputs to better understand your position. Frankly, we’ve been providing our data for about a year – I really thought this would be our chance to understand yours.<sup>189</sup>

Rather than listening to the considerable concerns of the automakers about their ability to meet the stringent standards, the imperial White House informed the companies that the standards were feasible. “We are prepared to ‘educate’ them,” one auto executive wrote to a colleague, “but I’m not sure they’re ‘willing to learn’!”<sup>190</sup> Ron Bloom told executives of one company just days before the announcement: “Our technical folks think you can get there. It’s the best we can do.”<sup>191</sup> When pressed the next day about additional flexibilities in order to gain agreement, Bloom bluntly told a representative of the company: “It looks bad for me and bad for you if [the company] is not there.”<sup>192</sup>

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<sup>186</sup> See Email from Tom Lehner, Toyota, to Jim Lentz, Toyota, et al. (May 13, 2011). [TOYOGRFE1336]

<sup>187</sup> Email from Nick Tamborra, Volkswagen, to Christoph Kohnen, Volkswagen, et al. (June 28, 2011).

[VWGOA181]

<sup>188</sup> See Email from Tom Lehner, Toyota, to Jim Lentz, Toyota, et al. (May 13, 2011). [TOYOGRFE1336]

<sup>189</sup> Email from Michael J. Robinson, Gen. Motors, to Gary Guzy, Exec. Office of the Pres. (June 24, 2011).

[HOCCAFE11046]

<sup>190</sup> Email from Sue Cischke, Ford Motor Co., to Alan Mulally, Ford Motor Co. (June 27, 2011). [ONP2 1511]

<sup>191</sup> Toyota, Handwritten Notes of Conversation between Jim Lentz and Ron Bloom (July 25, 2011).

[TOYOGRFE1320]

<sup>192</sup> Toyota, Handwritten Notes of Conversation between Jim Lentz and Ron Bloom (July 26, 2011).

[TOYOGRFE1323]

It is evident from these discussions that the Administration’s proposal was entirely a political calculation.<sup>193</sup> The Obama White House sought an “aggressive target” that would “force” the automakers to offer advanced technology vehicles.<sup>194</sup> When faced with the reality that the stringency “would impose . . . substantial unrecoverable costs” on the auto industry,<sup>195</sup> the Administration was forced to invent incentives to ease automaker compliance while maintaining the aggressive headline number. As one domestic automaker explained, “Bloom acknowledged that the stringency of the requirement is beyond [the company’s] capabilities, but they expect us to use ‘flexibilities’ that are available to fill the deficiencies.”<sup>196</sup> The specific flexibilities used by the White House to gain industry support were (1) a mid-term evaluation mechanism and (2) easier stringencies for trucks than cars.

## 1. Mid-Term Evaluation

The biggest dispensation made to secure automaker support was the inclusion of a “mid-term” evaluation in the standards. Arguably, such an evaluation would have been legally necessary to keep NHTSA on the right side of the law. EPCA clearly limits NHTSA’s rulemaking authority to five years, while the rule desired by CARB and EPA stretches over a decade into the future.<sup>197</sup> CARB and EPA were insistent that the second round of standards extend to 2025, calling the timeframe “non-negotiable,”<sup>198</sup> despite widespread concern that 2025 was too remote for an estimate of market forces.<sup>199</sup> To appease the environmental regulators’ demands while acknowledging the legal strictures of EPCA, the Administration invented a mid-term evaluation mechanism. The mid-term evaluation, intended to occur in 2018, would allow NHTSA to finalize fuel economy standards for MY 2022 to 2025, while EPA and CARB would determine whether changes were appropriate to their separate GHG standards.<sup>200</sup>

In the eyes of the auto industry, the mid-term review was “necessary” because the standards through 2025 are “too uncertain for so such far future.”<sup>201</sup> According to one automaker, “[e]arly on in the discussions the government became blindingly aware that all [manufacturers] were very concerned with projections so far into the future. As such the agencies refocused the discussions on only the stringencies for the first 5 years of the program. They did this by describing the 2025 standards as ‘aspirational’ and by planning a mid-term review.”<sup>202</sup> The mid-term evaluation was also sufficiently weak to get California in the fold. As

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<sup>193</sup> Mazda North American Operations, Washington Update: Talks Intensify on Future Fuel Economy Standards (July 6, 2011) (“[T]he agencies have been unwilling to provide a justification for the number, further adding to speculation that it was a political decision.”). [MAZDA289-90]

<sup>194</sup> Email from Mark L. Kemmer, Gen. Motors, to Bob Ferguson, Gen. Motors (June 22, 2011). [HOCCAFE13602]

<sup>195</sup> *Id.* [HOCCAFE13602]

<sup>196</sup> Gen. Motors, 2017-2025 MY CAFE/GHG Update (July 23, 2011). [HOCCAFE12231]

<sup>197</sup> See 49 U.S.C. § 32902(b)(3)(B).

<sup>198</sup> Email from Tom Stricker, Toyota, to Tom Lehner et al., Toyota (July 16, 2011). [TOYOGRFE1347]

<sup>199</sup> See Email from David Geanacopoulos, Volkswagen, to Christoph Kohnen et al., Volkswagen (July 26, 2011).

[VWGOA281]

<sup>200</sup> See Email from Nick Tamborra, Volkswagen, to Christoph Kohnen, Volkswagen, et al. (June 28, 2011).

[VWGOA181]

<sup>201</sup> Email from Yoshikatsu Nakamura, Toyota, to Tom Stricker, Toyota (July 2, 2011). [TOYOGRFE1339]

<sup>202</sup> Gen. Motors, 2017-2025 MY CAFE/GHG Update (July 15, 2011). [HOCCAFE12120-21]

one executive worried, “[m]y only concern is that we don’t turn down a good deal, trying for a perfect deal . . . . I don’t want to lose Calif.”<sup>203</sup>

The White House believed that the mid-term evaluation could be enough to get key automakers on board with the stringent standards. As Ron Bloom told one automaker, though the Administration understood the uncertainty with the 2025 standards, “a robust review and flexibilities can solve” the problem.<sup>204</sup> Bloom played a direct and substantial role in negotiating the automakers’ acceptance of the mid-term evaluation mechanism, using Ford as the primary conduit to the auto industry.<sup>205</sup> In one email dated July 25, 2011, Bloom wrote to Ziad Ojakli of Ford “We really need to land mid-term review tonight.”<sup>206</sup> The next day, Ojakli asked Bloom if the Administration could “move a bit on jud[icial] review” language.<sup>207</sup> Bloom responded, “[t]here is always one more issue and my team has now shut down. I have no authority, but if you give me something EXTREMELY small and specific that absolutely ends it, I will at least try. At this stage, even the effort will cost me.”<sup>208</sup> Ojakli then sent a revised proposal of mid-term review language to Bloom, saying “4 words and done on Midterm. Can we get this and close?”<sup>209</sup> Bloom replied, “If and only if this gets it done, done, and done on mid-term and everything else, I have pried out what is below. Z – we should have ended this Monday morning and this has cost me big time. You owe me!”<sup>210</sup>

Internal email communications reveal that EPA and CARB were not eager to restrict their rulemaking authority or to acknowledge their inability to foresee market conditions a decade into the future. EPA’s Gina McCarthy wrote to CARB’s Mary Nichols and the White House’s Gary Guzy, rejecting the automakers’ request for more certainty: “While the mid-term review as outlined in the attachment in no way meets the requests given to us by the [automakers], it meets our needs and should meet theirs.”<sup>211</sup> In another email a week later, McCarthy wrote that additional “gives” in the mid-term evaluation process will not satisfy automakers “and we cannot go as far as they want. For that reason I would suggest that we do not re-engaged [*sic*] substabatively [*sic*] with the [automakers] on this until progress is made on technical issues and we return face to face mtgs. If we are closer to finish line it will be easier to wrap this into a

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<sup>203</sup> Email from Susan Cischke, Ford Motor Co., to Peter Lawson, Ford Motor Co. (July 15, 2011). [ONP27] Even as the parties agreed about the need for the mid-term evaluation, the structure of the review was of considerable debate. Automakers advocated for a “trigger” mechanism “where the proposed standards only become effective if certain objective standards and assumptions . . . are realized.” Gen. Motors, 2017-2025 MY CAFÉ/GHG Update (July 15, 2011). [HOCCAFE12120-21] The industry stressed that all three agencies – EPA, NHTSA, and CARB – should participate in the mid-term evaluation and “be bound by the results to ensure continuation of a single national standard.” Gen. Motors, Talking Points. [HOCCAFE13243]

<sup>204</sup> Email from Tom Lehner, Toyota, to Kazuo Abe, Toyota (July 7, 2011). [TOYOGRFE1343]

<sup>205</sup> See, e.g., Email from Ziad Ojakli, Ford Motor Co., to David Leitch, Ford Motor Co. (July 19, 2011); [ONP3352] Email from Sue Cischke, Ford Motor Co., to Bob Holycross, Ford Motor Co. (June 27, 2011). [ONP2 25004]

<sup>206</sup> Email from Ron Bloom, Exec. Office of the Pres., to Ziad Ojakli, Ford Motor Co. (July 25, 2011). [ONP3823]

<sup>207</sup> Email from Ziad Ojakli, Ford Motor Co., to Ron Bloom, Exec. Office of the Pres. (July 26, 2011). [ONP3828]

<sup>208</sup> Email from Ron Bloom, Exec. Office of the Pres., to Ziad Ojakli, Ford Motor Co. (July 26, 2011). [ONP3828]

<sup>209</sup> Email from Ziad Ojakli, Ford Motor Co., to Ron Bloom, Exec. Office of the Pres. (July 26, 2011). [ONP3825]

<sup>210</sup> Email from Ron Bloom, Exec. Office of the Pres., to Ziad Ojakli, Ford Motor Co. (July 26, 2011). [ONP3825]

<sup>211</sup> Email from Gina McCarthy, Env'tl. Prot. Agency, to Gary Guzy, Exec. Office of the Pres., and Mary Nichols, Cal. Air Resources Bd. (July 8, 2011). [EPA DOC – NO BATES]

deal.”<sup>212</sup> Nichols agreed: “So my two cents worth is that we should get our version together [sic] get an agreement on it with Fordn [sic] and then stay put.”<sup>213</sup>

The Administration’s path toward including a mid-term evaluation in the MY 2017 to 2025 fuel economy and GHG emissions standards was emblematic of the entire negotiation process. The White House worked almost exclusively with a few select automakers to hammer out the terms of the mid-term evaluation, and then provided the language to the other automakers only days before the announcement.<sup>214</sup> The Administration preferred to foster confusion rather than make their true intentions clear. This preference for confusion was made clear in an email between a CARB official and John Hannon of EPA about the judicial review language in the draft mid-term evaluation: “Unless we’re trying to be over-the-top transparent by providing a potentially confusing and esoteric legal ‘test,’ I would not spell it out; auto’s attorneys can figure this out.”<sup>215</sup> Finally, and most importantly, the Administration pushed the bounds of the law in creating the mid-term evaluation process out of whole cloth, crafting a legal fiction without a basis in statute designed to entice automaker support.

## 2. A Second Bailout?

Even with the mid-term evaluation, the Administration’s proposed standards were still too stringent for the three domestic automakers. With light trucks accounting for up to half of their total truck fleets and with difficulty meeting the proposed standards even with their most fuel efficient vehicles,<sup>216</sup> the Big 3 automakers sought a carve out.<sup>217</sup> The Administration, which had originally proposed 5 percent stringency levels for both cars and trucks, responded by making a “second ‘offer’ – reducing the stringency for trucks from 5%/yr to 3.5%/yr” from 2017 to 2021.<sup>218</sup> After 2021 and the mid-term review, both cars and light trucks would be subject to a five percent annual increase, with added credits for hybrid pickup trucks.<sup>219</sup>

Although this new incentive helped the Administration secure the critical support of the three domestic automakers, the foreign manufacturers immediately noticed the inherent unfairness. “The proposal lacks competitive equity,” according to one executive of a foreign automaker, “[w]ithin the light truck category, there is further inequity since the largest trucks

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<sup>212</sup> Email from Gina McCarthy, Env’tl. Prot. Agency, to Gary Guzy, Exec. Office of the Pres., et al. (July 15, 2011).

[EPA DOC – NO BATES]

<sup>213</sup> Email from Mary Nichols, Cal. Air Resources Bd., to Ron Bloom, Exec. Office of the Pres., et al. (July 15, 2011). [EPA DOC – NO BATES]

<sup>214</sup> See, e.g., Email from William Charmley, Env’tl. Prot. Agency, to David Patterson, Mitsubishi (July 26, 2011). [MITSUBISHI 18-0001]

<sup>215</sup> Email from Aron Livingston, Cal. Air Resources Bd., to John Hannon, Env’tl. Prot. Agency (July 12, 2011).

[EPA DOC – NO BATES]

<sup>216</sup> Gen. Motors, GM U.S. Effective GHG; [HOCCAFE13486] Gen. Motors, What Would the GM Fleet Average Be if We Sold Only ~~Four~~ Three of Our Best Vehicles of Today? [HOCCAFE13512]

<sup>217</sup> See, e.g., Email from Jim Lentz, Toyota, to Dian Ogilvie, Toyota (July 20, 2011) (“GM is pushing for a ‘work truck provision.’ GM is attempting to exclude 30% of their fleet from CAFE.”). [TOYOGRFE1318-19]

<sup>218</sup> Gen. Motors, 2017-2025 MY CAFE/GHG Update (July 15, 2011). [HOCCAFE12120]

<sup>219</sup> See Sharon Terlep & Stephen Power, *Five Car Makers Back White House’s Tougher Fuel Economy Rules*, Wall St. J., July 27, 2011.

(made by the Big 3) have almost no burden in the first three years.”<sup>220</sup> Another described the incentive as “unfair” in that it gave “a complete pass on trucks” to manufacturers with a truck-heavy product mix.<sup>221</sup> One executive even described the light-truck carve-out as a “second auto bailout” [emphasis added].<sup>222</sup> The White House, too, recognized the inequity in the agreement. In a phone call with a Toyota executive thanking the company for their support, Bloom confessed: “I know how difficult this must have been in a culture where fairness is very important.”<sup>223</sup>

The light-truck carve out also undercut the Administration’s stated goal of reducing GHG emissions. According to one company, “[i]n MY 2016, the large pickup segment is responsible for approximately 15% of total light duty CO2 emissions. However, due to the curve as proposed by EPA, large pickups are then only responsible for 5% of the total CO2 fleetwide reductions in MY 2017. On the contrary, small and midsize SUVs account for much less of the overall emissions inventory, but are expected to carry much more of the burden for fleetwide reductions [in] 2017.”<sup>224</sup> A related document illuminates how the inequity would affect the reduction of GHG emissions:

Agencies reportedly are considering compliance curves that significantly reduce the compliance burden of the largest, most consumptive vehicles. According to one report, a certain domestic manufacturer would have to make no improvements in one of its most popular large vehicles until 2020. This policy will discourage the present trend toward downsizing that has produced significant emissions reductions. It will also retard investment in new fuel savings strategies.<sup>225</sup>

Despite the complaints about the competitive equity and the actual effect on GHG emissions, the Administration proposed differing stringencies for cars and light trucks because it desperately needed the support of the domestic auto manufacturers. Although “truck compliance is a common industry challenge,” according to one manufacturer, “the truck curves favor [Detroit 3] truck mix.”<sup>226</sup> Some foreign manufacturers supported the incentive for hybrid pickup trucks, but they privately expressed concern that the rule as eventually written would define a full-size pickup truck in a manner that would favor the domestic truck mix over the foreign manufacturers.<sup>227</sup> In the end, it was clear to all manufacturers who got the better deal.<sup>228</sup>

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<sup>220</sup> Email from David Geanacopoulos, Volkswagen, to Christoph Kohlen et al., Volkswagen (July 26, 2011). [VWGOA281]

<sup>221</sup> Email from Anna Schneider, Volkswagen, to David Geanacopoulos, Volkswagen (July 14, 2011). [VWGOA217]

<sup>222</sup> Email from Tom Lehner, Toyota, to Martha Voss, Toyota (July 26, 2011). [TOYOGRFE1255]

<sup>223</sup> Handwritten Notes of Conversation between Jim Lentz, Toyota, and Ron Bloom, Exec. Office of the Pres. (July 27, 2011). [TOYOGRFE1326]

<sup>224</sup> Email from Nick Tamborra, Volkswagen, to Stuart Johnson et al., Volkswagen (July 12, 2011). [VWGOA203]

<sup>225</sup> Volkswagen, Emissions/Fuel Economy Improvements Should Be Required Equitably Across the Fleet. [VWGOA216]

<sup>226</sup> Toyota, ONP2 EPA Agency Technical Meeting (July 12-13, 2011). [TOYOGRFE1345]

<sup>227</sup> Memorandum to File from Tom Stricker (July 28, 2011). [TOYOGRFE988]

<sup>228</sup> As one domestic automaker acknowledged, the “[e]ffective rate for [the company] is lower and several flexibilities will be included.” Gen. Motors, Outcome: Notice of Intent. [HOCCAFE12598]

## *A Second Agreement Is Announced*

After weeks of cajoling, the White House began moving toward a definitive agreement in the latter half of July 2011. This time, the Obama imperial presidency had a new partner in rounding up support for the agreement: the three domestic auto manufacturers. Swayed by the inclusion of the mid-term evaluation and a competitive advantage with regard to light trucks, the domestic automakers helped the White House get the support of other manufacturers and even the acceptance of EPA, NHTSA, and CARB.

The White House gave at least one domestic automaker a “complete package” of the proposal on Saturday, July 23, and asked that they review it by Monday morning.<sup>229</sup> The White House simultaneously asked another domestic automaker to lobby the other manufacturers to accept the standards. On July 26, Ziad Ojakli of Ford reported to Bloom: “good discussions w[ith] gm – we will be working together on this. . . . Also talking to C[hrysler].”<sup>230</sup> The next day, Ojakli reported to Bloom: “Talked to Nissan – looks like they are in if [Detroit 3] there. Think they will let you know when they come over at 11. Spoke w[ith] bmw bef[ore] they had to get off phone to talk to [M]unich. Leaning favorably . . . will close loop.”<sup>231</sup>

The Administration also used the automakers to convince its own agencies to accept flexibilities in the standards, as recounted by one auto executive: “Bloom wants help hammering his own team on some of the flexibilities – what a process.”<sup>232</sup> To ensure the regulators accepted the agreement as constructed by the White House, Bloom encouraged the domestic automakers to “keep pushing” EPA, NHTSA, and CARB to accept the flexibilities for light trucks.<sup>233</sup>

In the days before the announcement, the White House coordinated phone calls and meetings between the chief executives of several auto manufacturers and White House Chief of Staff Bill Daley.<sup>234</sup> Among the automakers, “[t]here [was] a general belief that Honda, Hyundai, and Nissan would join if the Big 3 accept[ed] the proposal . . . [and] Toyota might also.”<sup>235</sup> This is precisely what occurred. By July 27, reports indicated that five automakers – GM, Ford, Chrysler, Honda, and Hyundai – had agreed to the Administration’s proposal.<sup>236</sup> Ultimately, thirteen auto manufacturers agreed to the Administration’s MY 2017 to 2025 fuel economy and GHG emissions standards.<sup>237</sup> Volkswagen and Daimler did not agree to the standards because of

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<sup>229</sup> Gen. Motors, 2017-2025 MY CAFE/GHG Update (July 23, 2011). [**HOCCAFE12231**]

<sup>230</sup> Email from Ziad Ojakli, Ford Motor Co., to Ron Bloom, Exec. Office of the Pres. (July 26, 2011). [**ONP3834**]

<sup>231</sup> Email from Ziad Ojakli, Ford Motor Co., to Ron Bloom, Exec. Office of the Pres. (July 27, 2011). [**ONP3851**]

<sup>232</sup> Email from Michael J. Robinson, Gen. Motors, to Lee Godown & Mark Kemmer, Gen. Motors (July 18, 2011). [**HOCCAFE12155**]

<sup>233</sup> Email from Sue Cischke, Ford Motor Co., to David Leitch et al., Ford Motor Co. (July 19, 2011). [**ONP3350**]

<sup>234</sup> See, e.g., Email from David Geanacopoulos, Volkswagen, to Jonathan Browning, Volkswagen (July 26, 2011); [**VWGOA280**] Letter from Susan M. Cischke, Ford Motor Co., to Darrell Issa, H. Comm. on Oversight & Gov’t Reform, att. A at 9 (Dec. 19, 2011).

<sup>235</sup> Email from David Geanacopoulos, Volkswagen, to Christoph Kohnen, Volkswagen, et al. (July 26, 2011).

[**VWGOA283**]

<sup>236</sup> Terlep & Power, *supra* note 219.

<sup>237</sup> See Env’tl. Prot. Agency, Transportation and Climate: Presidential Announcements and Stakeholder Commitment Letters, <http://www.epa.gov/oms/climate/letters.htm> (last visited Aug. 7, 2012).

inequity and compliance concerns.<sup>238</sup> Like 2009, the supporting companies were each asked to sign a pre-drafted form commitment letter with a firm deadline for return.<sup>239</sup> And like in 2009, the White House announced the agreement at a highly touted public ceremony featuring executives from the supporting automobile manufacturers.<sup>240</sup>

### **THE ADMINISTRATION’S FLAWED PROCESS AND FAILED PRODUCT WILL HAVE LASTING CONSEQUENCES FOR CONSUMERS AND THE ECONOMY**

The process by which the Obama Administration developed fuel economy and GHG emissions standards for MY 2012 to 2016 and MY 2017 to 2025 was an egregious example of an imperial presidency forcing a policy outcome regardless of the law or due process. In promulgating the standards, the Administration conscientiously avoided any public discussion of the standards before announcing an agreement. It openly played automakers off of each other to gain a tactical advantage over the industry. The Administration hastily empowered an out-of-control state regulator to act as the “gun in the closet” while concurrently marginalizing NHTSA, the only regulator with a specialized knowledge of the costs and consequences of fuel economy policy. The inevitable product of this reckless process was a pair of rulemakings that reflect ideology over science and politics over process. As a result, American consumers will pay the price as automobiles become more expensive and less safe.

#### ***Opaque and Unbalanced Negotiations***

According to EPA’s Gina McCarthy, the Administration’s “national program for light-duty vehicles has garnered wide-spread support as a model for how government can effectively work with a wide range of stakeholders to develop thoughtful, data-driven standards which are supported by the regulated industry, consumer groups, labor unions, states, environmental organizations, and industry suppliers.”<sup>241</sup> Based on evidence available to the Committee, however, the negotiations that culminated in the fuel economy and GHG emissions standards were unnecessarily opaque, unbalanced, and driven by overt political goals.

The Administrative Procedure Act (APA) governs the manner in which agencies establish regulations, requiring all federal rulemakings to be transparent, deliberative, and unbiased.<sup>242</sup> Two other federal laws, the Federal Advisory Committee Act<sup>243</sup> and the Negotiated Rulemaking Act,<sup>244</sup> compliment the APA and require that agencies maintain transparency even when expediting the rulemaking process. In all facets of federal rulemaking – from pre-

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<sup>238</sup> See Letter from David Geanakopulos, Volkswagen, to Darrell E. Issa, H. Comm. on Oversight and Gov’t Reform, 3-4 (Dec. 12, 2011).

<sup>239</sup> See, e.g., Gary Guzy, Exec. Office of the Pres., to Michael J. Robinson, Gen. Motors (July 28, 2011).

#### **[HOCCAFE12413]**

<sup>240</sup> See The White House, Remarks by the President on Fuel Efficiency Standards (July 29, 2011).

<sup>241</sup> Letter from Gina McCarthy, Env’t. Prot. Agency, to Darrell Issa, H. Comm. on Oversight & Gov’t Reform (Nov. 1, 2011).

<sup>242</sup> Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*; Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act (1947).

<sup>243</sup> 5 U.S.C. App. 2.

<sup>244</sup> 5 U.S.C. § 561 *et seq.*

decisional negotiations to formal adjudications – administrative agencies are required to maintain the highest level of transparency and public participation.

The Administration violated the spirit – and possibly the letter – of these laws by negotiating agreements on both the MY 2012 to 2016 and MY 2017 to 2025 standards behind closed doors with only a select group of stakeholders. From the very beginning of the process, the Administration sought to “quietly” reach an agreement with just a handful of automakers, “holding no group meetings and taking care to not leak updates to the press.”<sup>245</sup> As CARB Chairman Mary Nichols proudly announced, the negotiations were founded on a mutual commitment to “put nothing in writing, ever.”<sup>246</sup> In fact, according to one automaker, the Administration asked a representative from that company to stop taking notes during a meeting in May 2009.<sup>247</sup> The agencies initiated the public notice and comment requirements of the APA only *after* the secret deliberations had produced an agreement. By proceeding in this manner, the Administration violated the APA by coming to a predetermined outcome of its rulemaking before the rest of America had a chance to participate in notice and comment proceedings.

In addition, in selectively engaging certain stakeholders, the Administration all but ensured that its final regulation would be unbalanced and inequitable. As one executive summarized in a February 2009 email, “[w]e will eventually reach the tipping point where the government interventions for the Detroit companies become anti-competitive – we may already be there.”<sup>248</sup> The Administration, undeterred by criticisms of favoritism, continued to select technological winners and losers. One auto executive said as much to EPA’s Margo Oge and NHTSA’s Ron Medford when he wrote “to share with you how disappointed we are in the overall fairness of the proposed agreement.”<sup>249</sup> Calling the proposal “not balanced and fair,” the executive stated:

I have been very challenged to explain the rationale for this and some other points in the proposal to our engineers and executives inside the company. The selective application of [hybrid electric vehicle] incentives to a class of vehicles where domestic [automakers] dominate communicates favoritism and an unfair playing field to all market participants.<sup>250</sup>

This executive was not alone. Other automakers expressed disappointment that the Administration included “bonus credits” for certain technologies – such as electric vehicles, flexible-fuel vehicles, and clean natural gas vehicles – but not for hybrid vehicles.<sup>251</sup> Indeed, as one company found, the Administration “picked electricity as the winner.”<sup>252</sup>

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<sup>245</sup> Sullivan, *supra* note 56.

<sup>246</sup> *Id.*

<sup>247</sup> Letter from Peter S. Spivack, Hogan Lovells, to Darrell E. Issa, H. Comm. on Oversight & Gov’t Reform, 3 (May 10, 2010).

<sup>248</sup> Email from Jo Cooper, Toyota, to Jim Lentz, Toyota (Feb. 20, 2009). [TOYOGRFE169]

<sup>249</sup> Email from Robert Bienenfeld, Am. Honda Motor Co., to Margo Oge, Env’tl. Prot. Agency, & Ronald Medford, Nat’l Highway Traffic Safety Admin. (July 26, 2011). [AHM1866]

<sup>250</sup> *Id.* [AHM1866]

<sup>251</sup> See, e.g., Email from Tom Stricker, Toyota, to Tom Lehner, Toyota, et al. (July 16, 2011). [TOYOGRFE1347]

<sup>252</sup> Gen. Motors, Key Messages for 10JUN10 EPA/NHTSA/CARB mtg; [HOCCAFE4410] see also Nat’l Pub. Radio, *All Things Considered*, “White House Pushes for Higher Fuel Efficiency” (June 29, 2011) (commenting that

## *Usurping Congressional Intent*

When Congress first began legislating vehicle fuel efficiency, it clearly intended NHTSA to be the sole regulator for the fuel economy of automobiles and specifically preempted any state regulation relating to fuel economy standards.<sup>253</sup> Yet as a result of the Administration's actions, automakers today are regulated by two distinct federal regulators under two separate federal statutes, as well as a rogue state regulator with unique state-based considerations. With such a disjointed regime and misaligned incentives, the regulatory framework adopted by the Administration is "one national program" in name only.

The result of the Administration's machinations was a drastic reconfiguration of the regulatory landscape for vehicle fuel economy and emissions never intended by Congress. An automaker document with the partial headline "Obama Sets National Standards at CA Stringency" outlined how the White House reconstituted the framework. Under the agreement, the document detailed, EPA would become the "[a]rbitrator of [the] framework, in lead role now and into future framework and stringency"; NHTSA would be "[r]elegated to [a] minor supporting role"; and CARB would accept the program and not enforce its state regulations through 2015 in exchange for becoming a "major player in stringency and framework 2016+."<sup>254</sup>

California's expanded role has dangerous implications for public policy. As one executive explained, "CARB thinks and acts . . . with no data to support a conclusion, they set a regulatory target that mandates a behavior (and related expense) until the painful reality (no market support for that standard) becomes a rear view mirror fact."<sup>255</sup> Another automaker described CARB and its environmentalist allies as "completely unrealistic" and "way too aggressive and unrealistic."<sup>256</sup> A third auto manufacturer echoed these concerns in a draft email to new White House Chief of Staff William M. Daley: "[I]t makes no sense that an environmental board in CA is usurping the regulatory prerogative, scope and expertise of NHTSA and EPA including [the] Administration's authority and ability to weigh nationwide job and economic considerations of arbitrary politically based standards being pushed by CA."<sup>257</sup> With such an oversized role of California, the final standards did not accurately reflect the safety and consumer needs of the nation as whole – but instead the policy goals of a narrow-focused environmental regulator.

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automakers are "troubled" by the Administration's proposed standards "largely because they are essentially an electric vehicle mandate.").

<sup>253</sup> 49 U.S.C. § 32919(a) (1975).

<sup>254</sup> Gen. Motors, Headline: Obama Sets National Standards at CA Stringency (under Reform); **[HOCCAFE1057]** *see also* Freeman, *supra* note 26, at 367 ("The car deal also announced the arrival of EPA as an equal partner in regulating the efficiency of the nation's cars and trucks.").

<sup>255</sup> Email from Michael J. Robinson, Gen. Motors, to Greg A. Martin, Gen. Motors (June 13, 2011).

**[HOCCAFE10951]**

<sup>256</sup> Toyota, Points to Make (May 2011). **[TOYOGRFE1337]** According to this manufacturer, CARB is poor federal regulator for three reasons: "[n]o requirement to consider jobs/economy (no manufacturing jobs in CA)"; "[n]o requirement to consider safety"; and "[h]istory of pushing too hard on advanced technology." *Id.*

**[TOYOGRFE1337]**

<sup>257</sup> Email from Peter Lawson, Ford Motor Co., to Elizabeth Brakebill et al., Ford Motor Co. (Jan. 15, 2011).

**[ONP3203]**

## Vehicle Safety

Perhaps the most significant consequence of the Administration's unilateral reconfiguration of fuel economy and GHG emissions regulations is the alarming de-emphasis on vehicle safety. In testimony and letters to the Committee, both the Administration and CARB steadfastly asserted that the proposed fuel economy and GHG emissions standards would have no effect on safety.<sup>258</sup> However, documents examined by the Committee indicate that the stringent standards could in fact compromise vehicle safety.

According to automobile industry experts, vehicular mass reduction is the most cost-effective method for reducing GHG emissions.<sup>259</sup> A survey of 1,100 automotive engineers, conducted by Wards Automotive, found that "[s]tringent fuel economy requirements like those set for 2025 will be impossible to meet without sacrificing the safety of the vehicles [we will] drive in the future."<sup>260</sup> A similar analysis by Edmunds.com showed that the Administration's proposed fuel economy standards may cause as many as 240 more automotive fatalities each year due to the overall reduced weight of vehicles.<sup>261</sup>

NHTSA was certainly cognizant of these safety concerns associated with mass reduction as it proceeded with the rulemaking. In a meeting with one manufacturer, NHTSA official Charles Kahane emphasized the relationship between fatality rates and vehicle mass, stating that from "2000 [to] 2007 all vehicles got heavier [and] fatal[ity] rates went down."<sup>262</sup> During the same meeting, Adrian Lund, the President of the Insurance Institute for Highway Safety (IIHS) remarked that "as weight increases, fatality rate decreases. SUVs now have same or lower fatal[ity] rate than car. First time this is true."<sup>263</sup> Lund also asserted that "[d]eath rates [are] still much higher for small + light vs. large + heavy" and that there is a "hi[gh] correl[ation] between size and weight in [the] real world."<sup>264</sup> Thus, Lund concluded that "fatality rates will go up as a result of downsizing."<sup>265</sup>

The environmental regulators, however, were not as concerned about mass reduction. CARB told the Committee that its state standards do not "require weight reduction, thus, there are no safety concerns."<sup>266</sup> This statement ignores the fact that the new standards cannot be feasibly met without mass reductions.<sup>267</sup> As for EPA, though it told the Committee that it left

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<sup>258</sup> See *Running on Empty: How the Obama Administration's Green Energy Gamble Will Impact Small Business and Consumers*: Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov't Spending of the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2011); Letter from Mary Nichols, Cal. Air Resources Bd., to Darrell Issa, H. Comm. on Oversight & Gov't Reform, att. 1, at 6 (Nov. 23, 2011).

<sup>259</sup> See Am. Honda Motor Co., Technology Observations for this Scenario. [AHM59]

<sup>260</sup> Peter Valdes-Dapena, *Auto Engineers: Mileage Rules Will Hurt Safety*, CNN Money, Aug. 3, 2011.

<sup>261</sup> Jeremy Anwyl, *Safety Over Fuel Economy?*, AutoObserver, Sept. 30, 2011.

<sup>262</sup> Mazda, Handwritten Notes of "Size and Safety" Meeting with NHTSA (Feb. 25, 2011). [MAZDA24]

<sup>263</sup> *Id.* [MAZDA25]

<sup>264</sup> *Id.* [MAZDA25]

<sup>265</sup> *Id.* [MAZDA25]

<sup>266</sup> Letter from Mary Nichols, Cal. Air Resources Bd., to Darrell Issa, H. Comm. on Oversight & Gov't Reform, att. 1, at 6 (Nov. 23, 2011).

<sup>267</sup> See Letter from David Geanacopoulos, Volkswagen, to Darrell E. Issa, H. Comm. on Oversight and Gov't Reform, 8-9, 13 (Dec. 12, 2011); Mazda, Fuel Economy Talking Points for Government Meetings 4-5 (July 14, 2011); [MAZDA 17-23] Staff Update on Recent Activities to Support Development of More Stringent GHG

safety concerns to the expertise of NHTSA,<sup>268</sup> in private, EPA openly questioned NHTSA’s safety expertise. In one July 2010 email regarding a NHTSA “fatality memo,” EPA official Ed Nam wrote to NHTSA “we do not believe that this analysis is predictive” and “[w]e still disagree with the basic conclusions . . . that taking mass out of passenger cars will inherently result in higher fatalities.”<sup>269</sup> Subsequently, in forwarding the email to several CARB and EPA officials, Nam wrote: “By now, you should have gotten NHTSA’s safety memo . . . . I have included below the response that Hugh, Mike, Joe and I drafted for your reference. So NHTSA already knows our position. . . . NHTSA shows no sign on relenting on this issue.”<sup>270</sup> After the CARB officials responded that they had never received the NHTSA fatality memo, William Charmley of EPA wrote: “Then let’s not worry about it now. Perhaps they have changed their minds and will drop it. So, for now, assume that Ed never sent you this document.”<sup>271</sup> These emails strongly suggest that environmental activists at EPA and CARB had no intention of slowing down the process in order to properly evaluate the safety consequences of their new mandates.

### ***Vehicle Pricing and Consumer Acceptance***

Another consequence of the Administration’s flawed rulemaking process is a substantial increase in the cost of new automobiles and a corresponding decrease in consumer choice. Although automakers raised these concerns with the Obama Administration, documents obtained by the Committee indicate that the Administration did not seriously consider these consequences while designing the rule.

The Center for Automotive Research (CAR) found that technology changes associated with the proposed regulations “would drive up the average cost of a new vehicle by between \$3,810 and \$11,390 . . . from 2008 to 2025.”<sup>272</sup> According to CAR, the stringent standards would negatively affect the economy, with a total employment loss for the U.S. economy of 1,690,000 workers, a reduction in vehicle sales by almost two million units, and a dramatic increase in the average age of vehicles on American roadways.<sup>273</sup> In addition, the Energy Information Administration estimates that the new fuel economy rules will eliminate from the

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Emission Standards for Model Year 2017-2025 Passenger Vehicles 10 (Oct. 21, 2010) (“Mass reduction is the most cost effective”). [AHM59]

<sup>268</sup> See *Running on Empty: How the Obama Administration’s Green Energy Gamble Will Impact Small Business and Consumers*: Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov’t Spending of the H. Comm. on Oversight & Gov’t Reform, 112th Cong. (2011) (question and answer with Margo Oge) (“[W]e rely on NHTSA when it comes to [safety of] the fuel economy greenhouse gas program.”).

<sup>269</sup> Email from Ed Nam, Env’tl. Prot. Agency, to James Tamm & Kevin Green, Dep’t of Transp. (July 1, 2010).

[CARB14855-56]

<sup>270</sup> Email from Ed Nam, Env’tl. Prot. Agency, to Steve Albu, Cal. Air Resources Bd., et al. (July 19, 2010).

[CARB14855]

<sup>271</sup> Email from William Charmley, Env’tl. Prot. Agency, to Nicholas Lutsey & Steve Albu, Cal. Air Resources Bd. (July 19, 2011). [CARB14855]

<sup>272</sup> Center for Automotive Research, *The U.S. Automotive Market and Industry in 2025* (June 2011).

[HOCCAFE10992]

<sup>273</sup> *Id.* [HOCCAFE10992]

market automobiles costing less than \$20,000 by 2025.<sup>274</sup> The National Automobile Dealers Association asserts that the standards will increase the average price of a vehicle by \$3,200.<sup>275</sup>

The automobile industry repeatedly stressed these issues to the Administration, telling the regulators and the White House that the proposal's costs were "significantly understated," with German automakers and those companies with high truck penetration having the highest costs.<sup>276</sup> "EPA needs to be careful about the cost required to comply with the standards to achieve the goal," one automaker warned, "otherwise too expensive vehicles may be left at dealerships unpurchased."<sup>277</sup> Another manufacturer cautioned that the cost "does not recognize capital investment required to move to advanced materials" and "[e]conomic viability is at risk because the pathways are not market driven."<sup>278</sup>

As is evident from documents available to the Committee, the Administration's proposal underestimated the cost of advanced technologies needed to meet the standards. For example, automakers told the regulators during deliberative meetings that battery costs would be about \$300 to \$400 per kilowatt-hour in 2020 and \$250 to \$300 per kilowatt-hour in 2025; yet, the Administration's NOI included a cost substantially below that level – assuming \$191 per kilowatt-hour.<sup>279</sup> NHTSA also accused EPA and CARB of undervaluing the cost of electric vehicles by not "estimat[ing] the cost and effect of each technology in a manner that holds vehicle performance and utility constant."<sup>280</sup>

The Administration's proposal also relies on high gasoline prices to support consumer acceptance of advanced technology, which could cost up to eight times that of conventional engine technology.<sup>281</sup> In other words, the success of this program rests on gas prices reaching \$5 and \$6 a gallon. "In all the research, once gas hits \$5/gal sustained as a national average, then behavior would likely drastically change as segments would shift, powertrain choices become more geared towards FE and less momentum."<sup>282</sup> Until that time, the market would not support the vehicles required by the Administration's standards. One automaker explained that even with a stringency level less than five percent and gasoline at \$4 per gallon, the company would still experience significant losses from 2017 to 2020.<sup>283</sup> According to a manufacturer known for

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<sup>274</sup> See U.S. Energy Information Admin., Annual Energy Outlook 2011, at 27 fig. 18 (Apr. 2011).

<sup>275</sup> Nat'l Automobile Dealers Assoc., NADA Supports a Single Fuel Economy Standard, <http://www.nada.org/legislativeaffairs/fuel-economy-environment/california-waiver/default.htm>.

<sup>276</sup> Gen. Motors, EPA/NHTSA/CARB Review GM Feedback for 2016 to 2025MY Notice of Intent (NOI) and Technical Assessment Report (TAR) Green House Gas (GHG) Rulemaking 22 (Oct. 26, 2010). [**HOCCAFE5804**]

<sup>277</sup> Email from Keiko Kawaguchi, Mazda, to Barbara Nocera, Mazda, et al. (Oct. 26, 2009). [**MAZDA104**]

<sup>278</sup> Gen. Motors, EPA/NHTSA/CARB Review GM Feedback for 2016 to 2025MY Notice of Intent (NOI) and Technical Assessment Report (TAR) Green House Gas (GHG) Rulemaking 8-11 (Oct. 26, 2010). [**HOCCAFE5790-93**]

<sup>279</sup> Gen. Motors, Autos' Views on NOI. [**HOCCAFE5912**]

<sup>280</sup> Email from Kevin Green, Dep't of Transp., to Steve Albu, Cal. Air Resources Bd., et al. (July 31, 2011). [**CARB13288-89**]

<sup>281</sup> Toyota, ZEV Required PHEVs and BEVs Are More Expensive, According to the TAR ("On a per-vehicle basis, [battery-electric vehicles] can cost up to 8x the cost of an [internal combustion engine] for similar benefits.")[**TOYOGRFE1069**]

[**TOYOGRFE1069**]

<sup>282</sup> Email from Dwight Brown, Gen. Motors, to Steve Carlisle & Mary Sipes, Gen. Motors (July 11, 2011). [**HOCCAFE11702**]

[**HOCCAFE11702**]

<sup>283</sup> Gen. Motors, 2017-2025 CAFE/GHG Discussions Update (July 8, 2011) (slide "Current State of Discussions"). [**HOCCAFE11598**]

its fuel efficient cars, “[t]he pay-off for the customer in fuel savings between 45-60 mpg versus the additional technology costs just doesn’t work – it is literally between a 10 and 20 year return on the additional cost depending on whether you assume gas will be at \$4 or \$6 per gallon” [emphasis added].<sup>284</sup>

There is little doubt that the Administration’s proposal will result in more expensive automobiles. As one automaker succinctly told the agencies during the rulemaking process, “[h]igher fuel economy/lower GHG performance costs money, a lot of money. Consumer acceptance/willingness to pay/gas price is an issue.”<sup>285</sup> With a three percent annual increase in stringency, the price of a car could increase up to \$750 and the price of a truck could increase up to \$1,050; with a six percent annual increase, the price of a car could increase up to \$2,700 and the price of a truck could increase as much as \$4,330.<sup>286</sup> Yet, according to research done by another automaker, “consumers are only willing pay extra for fuel-efficient technology if they see savings in consumption within a year.”<sup>287</sup> Thus, with the added cost for advanced technology vehicles and the slow rate of fuel savings, it is highly likely that these automobiles will be both expensive and unpopular with consumers.

Talking points written for the Detroit 3 in June 2011 – a month before the second agreement was announced – drive home this point: “Data shows high fuel economy standards kills jobs, presents doomsday scenario for automakers, and delivers insufficient pay-offs to consumers.”<sup>288</sup> The automakers argued that the Administration’s proposal “is out of line with the available data and is not realistic” because “the market will not bear 55 mpg or the ramp up rate of 5% per year to get there.”<sup>289</sup> “The rules would be a profit and job killer for domestic full line manufacturers, undoing the recovery the Administration has helped achieve in recent years.”<sup>290</sup>

This concern from the automakers persists into the present. As one company told the Committee: “[T]he response of the market to vehicles with increased fuel economy, along with exogenous market factors, such as the price of fuel, public attitudes toward climate change, energy security, etc., is highly uncertain; this market response is essential to estimating the real cost to the company.”<sup>291</sup> Another auto manufacturer agreed: “We believe the current proposal is not feasible. The standards appear to be based on overly optimistic assessments of the rate at which the market will accept new technologies, as well as the rate at which the new technologies will be available. We believe the regulation will force manufacturers to limit vehicle choices and will force auto companies to sell expensive technology that customers will not want or accept.”<sup>292</sup> In fact, Ford recently announced that its most popular pickup truck, the F-150, would

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<sup>284</sup> *Id.* [HOCCAFE11020]

<sup>285</sup> Gen. Motors, Key Messages for 10JUN10 EPA/NHTSA/CARB mtg. [HOCCAFE4410]

<sup>286</sup> *See* Am. Honda Motor Co., New Vehicle Price Increase. [AHM62]

<sup>287</sup> Chrysler, Framework for a Successful 2017-2025 MY National GHG Program. [EPA DOC – NO BATES]

<sup>288</sup> Gen. Motors, Fuel Economy Talking Points (June 20, 2011). [HOCCAFE11020]

<sup>289</sup> *Id.* [HOCCAFE11020]

<sup>290</sup> *Id.* [HOCCAFE11020]

<sup>291</sup> Letter from John W. Alden, Jr., Am. Honda Motor Co, to Darrell Issa, H. Comm. on Oversight & Gov’t Reform 12 (Dec. 12, 2011).

<sup>292</sup> Letter from David Geanacopoulos, Volkswagen, to Darrell Issa, H. Comm. on Oversight & Gov’t Reform 8 (Dec. 12, 2011).

now be constructed out of aluminum to reduce vehicle weight as a means of achieving the Administration's stringent standards.<sup>293</sup> Ford made this drastic change knowing full well that aluminum will increase the cost of the vehicles and possibly reduce consumer acceptance.<sup>294</sup>

As Edmunds.com's Jeremy Anwyl testified in October 2011, "[c]onsumers matter because responding to their needs is what drives innovation and innovation is what should drive our economy."<sup>295</sup> The Administration, however, virtually ignored consumer preference and vehicle pricing to establish stringent fuel economy and emissions standards that will require automakers to offer more expensive vehicles that the marketplace will not support.

## CONCLUSION

In setting national fuel economy and GHG emissions standards, the Obama Administration was not slowed by statute, process, or facts. The Administration dictated politically motivated standards to a captive automobile industry, empowering the state of California to serve as "gun to the head" of the industry and leveraging its significant political and economic interests gained during the auto bailout. The White House conducted opaque and unbalanced negotiations with a select and biased group of stakeholders. It violated congressional intent in drastically restructuring the regulatory framework for national vehicle fuel economy and emissions. The Administration provided targeted incentives intended to induce the support of the three domestic automakers, at the expense of other stakeholders.<sup>296</sup> As a consequence, in the coming years, Americans will be forced to drive expensive, unpopular, and unsafe automobiles mandated by the Obama Administration.

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<sup>293</sup> Mike Ramsey, *Ford Plans New Pickup with Aluminum Body to Boost Mileage*, Wall St. J., July 26, 2012.

<sup>294</sup> *Id.*

<sup>295</sup> "Running on Empty: How the Obama Administration's Green Energy Gamble Will Impact Small Business and Consumers": *Hearing before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov't Spending of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011) (statement of Jeremy Anwyl, chief executive officer of Edmunds.com).

<sup>296</sup> Mazda, *Talking Points for White House Meeting on MY 2017-2025 CAFÉ/GHG Emissions Standards* (July 14, 2011) ("As a small company, it take us more time to develop ad incorporate game-changing new technologies that can meet all U.S. safety and emission standards into our product line."). [MAZDA14-15]

## About the Committee

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The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. It has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. The Committee's mandate is to investigate and expose waste, fraud and abuse.

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